85-1268

No.

In the Supreme Court of the United States

OCTOBER TERM, 1985

MASSMAN CONSTRUCTION CO.,
Petitioner,

vs.

TENNESSEE VALLEY AUTHORITY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

R.W. MILLER
(Counsel of Record)
MILLER AND BASH, P.C.
4310 Madison Avenue
Kansas City, Missouri 64111
Tel. No. (816) 531-0755
Attorney for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTIONS PRESENTED

1. Can a government contractor waive its appeal rights under the Contract Disputes Act of 1978 when the contracting officer fails to advise the contractor of those appeal rights as required by Section 6(a) of the Contract Disputes Act and the applicable regulations?

2. Can a government contract be amended by an oral opinion from an unauthorized government employee to only one bidder when the contract documents, the applicable regulations, and well-established precedent require such changes to be accomplished by written addendum submitted to all bidders?

3. Can the Sixth Circuit deny additional compensation to a government contractor based on delays caused by Tennessee Valley Authority by invoking *United States v. Rice*, 317 U.S. 61 (1942), which is a decision so distinguished by the Court of Claims as to no longer govern such disputes?

4. Can the Sixth Circuit deny Massman over a million dollars in incurred costs by its refusal to apportion between those caused by Tennessee Valley Authority and those caused by others?

5. Can the Sixth Circuit affirm hearing procedures of Tennessee Valley Authority which are so controlled by Tennessee Valley Authority as to deny due process and to give the impression of impropriety?

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Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on August 13, 1985.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit in the captioned matter is reported at 769 F.2d 1114 (1985), and is reprinted in the Appendix hereto, *infra*, p. A1.

The opinion of the United States District Court for the Eastern District of Tennessee is reprinted in the Appendix hereto, *infra*, p. A30. The opinions of the Hearing Officer appointed by the Tennessee Valley Authority are reprinted in the Appendix hereto, *infra*, p. A44.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Sixth Circuit were entered on August 13, 1985. The order of the Sixth Circuit denying Petitioner's petition for rehearing was entered on October 25, 1985, and this petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Contract Disputes Act, 41 U.S.C. 601 *et seq.*

Wunderlich Act, 41 U.S.C. 321-322.

These statutes are reprinted in the Appendix hereto, *infra*, pp. A123, A137.

STATEMENT OF THE CASE

On November 4, 1974, Tennessee Valley Authority ("TVA") issued an invitation for bids which provided that the work on a construction project was to commence no later than June 15, 1975, that the contractor had 215 days to complete the work, and that all the work had to be completed no later than December 15, 1975. Under the bid documents, and also under common practice in the construction industry, all bids were to be based on the bid documents, and any changes in the bid documents had to be made by a written addendum submitted to all bidders. Prior to submittal of its bid, personnel of Massman Construction Co. ("Massman") visited the job site and encountered a construction employee of TVA who stated that he doubted the work could start by the first of June, 1975. However, prior to the time for submittal of bids, TVA issued no written addenda advising any bidder that the work could not be commenced within thirty days after award or that the completion date would be extended beyond December 15, 1975.

When TVA made its award to Massman on March 13, 1975, the latest date under the contract for the work to start was June 15, 1975, and the completion date remained December 15, 1975. The contract specifically stated that time was of the essence and that Massman, as a successful bidder, had to be prepared to work three shifts a day, seven days a week, if necessary to complete the project by December 15, 1975. It was uncontroverted that Massman bid and accepted this job based on working uninterrupted during one construction season in 1975 and completing its work prior to the advent of winter. The cost factor of not working through a winter was a key element of Massman's bid.

TVA did not issue any notice to proceed to Massman in 1975 and TVA refused to allow Massman to do any work in 1975. When TVA would not permit Massman to start work as promised, Massman wrote a series of letters to TVA requesting TVA to advise Massman when it would be permitted to start work. Massman's letters also advised TVA of the cost Massman was incurring for the account of TVA due to TVA not making the work site available as promised.

On August 12, 1975, TVA advised Massman that it could commence work on April 1, 1976, but by letter dated October 28, 1975, TVA advised Massman that no work could be started prior to August 15, 1976. TVA's Contracting Officer further advised Massman that, if Massman would start work August 15, 1976, TVA would pay Massman for all costs Massman would incur as a result of the failure of TVA to allow Massman to commence work promptly in 1975.

At this time Massman could either (a) do no work on the project and be compensated for its damages due to TVA's breaches or (b) proceed with the work on August 15, 1976 and be compensated for all its costs resulting from TVA's delays.

In November, 1975, Massman agreed to accept TVA's offer not to terminate the contract due to the previous breaches by TVA and to start work on August 15, 1976 with the express understanding that Massman would receive an equitable adjustment to reflect the increased costs due to these changes in the start date.

On this project major items of work had to be done in the river, which necessitated using large pieces of specially constructed floating marine equipment. Massman had its own equipment of this type available in 1975 to perform this work, and the availability of this equip-

ment was a key factor in the bid of Massman. All through the spring, summer and fall of 1975, Massman had maintained this floating equipment and its personnel in readiness to perform the TVA project. It was not until the first of November, when Massman was advised by TVA that the work would not commence until August 15, 1976, that Massman determined it could no longer hold in readiness its large pieces of marine equipment and personnel. Massman then released this equipment and personnel to perform work on other projects. Although the daily cost of this equipment was over $20,000.00 per month, TVA never paid Massman anything for holding this equipment on standby.

TVA finally issued the notice to proceed so that Massman could commence work the middle of August in 1976. Work which Massman began in August of 1976 was the same work that Massman planned and had based its bid on starting some fourteen months earlier. Starting the work late in August, 1976 prevented Massman from finishing the work prior to the advent of winter weather. Massman further encountered one of the harshest and most severe winters in Tennessee history in 1976-1977, which greatly reduced its productivity and correspondingly increased its costs. Massman's costs to perform were further increased by Massman being unable to use its own equipment and having to rent more expensive marine equipment from others.

Massman's costs were further increased when TVA ordered Massman to shut down its operations on this project for three months during the heart of the construction season from April 30, 1977 until August 1, 1977 due solely to the fault of TVA. Except for this shutdown, Massman would have completed the work on the project in September of 1977. Instead, the project could not be completed until February, 1978, which forced Massman

to work through a second winter. Although requested by Massman on many occasions, TVA never permitted Massman to return the expensive leased equipment during the three month shutdown, and Massman was required to pay rental during this entire period at $94,000.00 per month.

On March 2, 1978, May 8, 1978, July 21, 1978, October 31, 1978, and on February 21, 1979 (eight days prior to the effective date of the Contract Disputes Act), Massman wrote the contracting officer outlining and detailing Massman's claims which are the subject of this action.

On March 1, 1979, the Contract Disputes Act of 1978[1] ("CDA") became effective, and on May 22, 1979, TVA issued regulations implementing the CDA. The Act itself and these regulations required TVA to give Massman prompt and accurate notification that Massman had a right to elect to proceed on its dispute under the terms of the CDA. TVA never gave Massman any notice of its right to proceed under the CDA.

On November 20, 1979, the contracting officer for TVA finally issued his decision and found TVA liable for the costs Massman incurred during the three month shutdown in 1977 in the amount of $361,336, but denied the balance of Massman's claims, including the equitable adjustment promised by the contracting officer in his letter of October 28, 1975. Contrary to the CDA and the regulations issued by TVA, the contracting officer in his decision did not advise Massman of its rights to appeal under the CDA.

TVA recognized all the delays that it had caused Massman, and issued Change Order No. 3, changing the original completion date from December 15, 1975 to

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1. 41 U.S.C. 601 *et seq.*, P.L. 95-563, 92 Stat. 2383. Unless otherwise indicated, all citations are to the CDA and not to the Act as codified in the United States Code.

March 18, 1977. On November 29, 1978, TVA issued Change Order No. 8, changing the completion date from March 18, 1977 to September 30, 1977. The extension of the completion date from December 15, 1975 to September 30, 1977 had the effect of extending the contract completion by 654 days.

On December 3, 1979, Massman timely filed its Notice of Appeal from the decision of the contracting officer and formally requested the contracting officer to advise it of its appeal rights. TVA waited 45 days before responding to Massman's request and then had its general counsel advise Massman on January 18, 1980 that "the current dispute between TVA and Massman is not governed by" the CDA. The applicable TVA regulations designated the general counsel of TVA as the person to advise contractors as to their rights to appeal under the CDA.

The Hearing Officer conducted a hearing on Massman's appeal on the issue of entitlement on August 4, 1980 and rendered a decision on March 3, 1981 finding that TVA should have issued the Notice to Proceed by October 1, 1975 and that TVA was liable to Massman for the additional costs incurred by Massman as a result of TVA's multiple breaches of the contract.

A subsequent hearing was held on August 26, 1981 on the question of the amount due Massman under the March 3, 1981 decision. Nineteen months after the hearing, on March 17, 1983 when the Hearing Officer had failed to render a decision on this dispute, which had then been pending over five years, Massman elected to proceed under the CDA and filed suit in the United States District Court for the Eastern District of Tennessee seeking a trial *de novo* for the equitable adjustment which TVA had failed to accord it. After the lawsuit was filed, the office

of general counsel for TVA, which was defending TVA against Massman's claims, engaged in three separate *ex parte* communications with the Hearing Officer and during these communications requested a decision by the Hearing Officer to be used as a defense for TVA against allegations made by Massman in the lawsuit.

On May 27, 1983, two months after Massman elected to proceed under the CDA and filed its original claim in the District Court, the Hearing Officer issued his final decision and adopted, *in toto*, the final damage figures proposed by TVA. This opinion considered the amount granted to Massman by the contracting officer's decision of November 20, 1979 and granted TVA judgment against Massman for $41,925.00. Although TVA introduced no evidence on the question of damages, the Hearing Officer on five items alone made a downward adjustment of $159,545.00 in the amount which the TVA contracting officer had paid Massman for the 90 day shutdown. Although the Hearing Officer found TVA liable for ten and one-half months of delay from October 1, 1975 to August 15, 1976, and although TVA granted Massman extensions of time extending the contract for 654 days as a result of delays attributable to TVA, the Hearing Officer did not give Massman any damages except for damages during the 90 day shut down.

The Hearing Officer's decision has been reviewed by the United States District for the Eastern District of Tennessee, which acquired jurisdiction pursuant to 28 U.S.C. 1337 as incorporated by §10 of the CDA and pursuant to 28 U.S.C. §1331. The United States Court of Appeals for the Sixth Circuit affirmed the District Court in part and remanded in part for additional findings.

REASONS FOR GRANTING THE WRIT

1. By holding that the contracting officer was not required to advise Massman of its appeal rights under the Contract Disputes Act, the Sixth Circuit has nullified the clear language of the Contract Disputes Act and TVA's regulations and thereby has violated the well-established precedent of the United States Court of Claims and the Federal Circuit that a contractor's appeal time does not begin to run until the contractor is advised of its appeal rights.

The decision below nullifies an Act of Congress, disregards a regulation of TVA, and establishes a dangerous precedent of allowing governmental agencies to violate a clear and unequivocal mandate and by such violation to defeat the express rights accorded citizens by Congress. No other Circuit has gone so far to defeat the clear rights under the CDA which Congress expressly accorded Massman and other contractors. As such, the Sixth Circuit's decision denying Massman's right to elect to proceed under the CDA conflicts with decisions of the Court of Claims and the Federal Circuit, as well as the Boards of Contract Appeals.

In the CDA, Congress gave government contractors the absolute right to be advised of their appeal rights pursuant to §6(a) and the right to make various elections as to the forum in which to litigate their claims pursuant to §§7, 10 and 16. The contractor has the right to appeal a contracting officer's decision to the appropriate agency board of contract appeals within ninety days from the date of receipt of the contracting officer's decision. §7. Alternatively, a government contractor has the right to bring an action directly on the claim in the United States Claims Court; however, since this claim is against TVA,

the contractor has a right to bring the action in a Federal District Court pursuant to 28 U.S.C. 1337. §10(a)(1)(2). If an action is filed in the Federal District Court, the complaint must be filed within twelve months from the date the contractor receives the contracting officer's decision advising him of his rights of appeal. §10(a)(3).

Congress determined that the CDA controls all disputes arising out of government contracts executed after March 1, 1979. §§3 and 16. For contracts executed prior to March 1, 1979, such as Massman's contract, Congress gave contractors the right to continue under pre-CDA disputes procedures or to elect to proceed under the CDA for any claims pending before the contracting officer on March 1, 1979, or initiated thereafter. §16.

Based on this statutory framework of the CDA, Congress allowed Massman to proceed under the Disputes Clause of its contract or to elect to proceed under the CDA. This election gave Massman the right to litigate its claims against TVA before TVA's Hearing Officer or the United States District Court.

Pursuant to §6(a), Congress mandated that the contracting officer in his decision "shall inform the contractor of his rights as provided in this act." Congress thus imposed a statutory duty on TVA to inform Massman of its appeal rights, including the CDA election and the choice of forum between the Board and the District Court.

TVA published regulations, which became effective on May 22, 1979, and which required TVA to include in its contracting officer decisions "information about a contractor's rights of appeal under Sections 7 and 10 of the [Contract Disputes] Act." 18 C.F.R. §1308.12(b)(3). Those regulations also provided that a contractor, such as Massman, having a "dispute pending before a contracting officer on March 1, 1979 or initiated thereafter," had the right to elect to proceed under the CDA.

It is uncontroverted that the contracting officer failed to comply with §6 of the CDA and violated his statutory duty to advise Massman of its rights to elect to proceed under the CDA. Moreover, the failure to comply with this mandatory requirement was further compounded by TVA when the general counsel of TVA, in response to a timely inquiry by Massman, erroneously represented to Massman that the CDA did not control the disposition of Massman's claim.

Although TVA clearly violated the statutory mandate of §6(a), the Sixth Circuit held that Massman was not entitled to receive notice of its appeal rights from the contracting officer. According to the Sixth Circuit, Massman was charged with notice of its appeal rights under the CDA because the Act is a matter of public record.

The Sixth Circuit's analysis renders §6(a) of the CDA and TVA's own regulations meaningless. Based on the Sixth Circuit's decision, no contracting officer will ever be required to comply with the CDA or TVA's own regulations and TVA will never have to advise a contractor of its rights under the CDA since the contractor is deemed to have knowledge of his rights. Congress expressly provided that the contracting officer is required to apprise a contractor of its rights under the CDA and the Sixth Circuit can not strip a contractor of these rights. The Sixth Circuit cites no case law or legislative history to support its position denying a contractor rights granted by Congress.

The United States Court of Claims and the Board of Contract Appeals have uniformly held that a contractor's appeal time, as provided in the Disputes Clause of a contract or as provided by statute or regulation, does not begin to run until the contracting officer has advised a contractor of his appeal rights.

In *Roscoe-Ajax Construction Company v. United States*, 198 Ct. Cl. 133, 458 F.2d 55 (1972), the Court of Claims held that the contractor's thirty day appeal time did not begin to run on receipt of the adverse contracting officer's decision, since the contracting officer did not apprise the contractor of its appeal rights. Similarly, the contracting officer's decision in this case does not trigger the running of Massman's appeal time since the contracting officer failed to advise Massman of its right to proceed under the CDA. Thus, this Court must allow Massman to exercise its statutory right to elect the CDA and to proceed in a *de novo* hearing before the District Court. See also, *Bostwick-Batterson Co. v. United States*, 151 Ct. Cl. 560, 283 F.2d 956 (1960).

In the case of *Sherry-Richards Co.*, ASBCA No. 6905, 61-2 BCA ¶3167 (1961), the Armed Services Board of Appeals reasoned as follows:

> [I]n order for a decision under the Disputes clause to create vested rights in favor of the Government, if not appealed from within the 30-day appeal period, the decision must be communicated to the contractor in such a fashion that the contractor is fully and clearly informed as to the nature of the decision and his right of appeal within a limited time.

In *W. H. Moseley Co.*, ASBCA No. 27370-18, 83-1 BCA ¶16,272 (1983), the board stated as follows:

> Clearly, if a decision may not be recognized as final because it does not advise a contractor of its right to appeal, it should not be recognized as final if its instructions concerning the elective right to appeal or to bring an action in court are *prejudicially erroneous*. The mandate that contracting officers inform contractors of their rights, which is now a statutory requirement . . . precludes the Board from recognizing the contracting officer's decision in this case as a procedurally valid final decision." *Id.*, at p. 80,852. (Emphasis added).

The holding of the *Moseley* case is precisely in point with the issues involved in the present dispute. Massman was entitled to make a knowing election of its rights to proceed under the CDA, but TVA never informed Massman of its right to make that election. TVA compounded this failure to promptly and properly advise Massman of its rights when TVA had its general counsel by its letter of January 20, 1980 mislead Massman as to Massman's appeal rights under the CDA. Such action on the part of TVA renders the decision of its contracting officer procedurally invalid and entitles Massman to elect to proceed with its dispute under the CDA and entitles Massman to proceed before the District Court *de novo* to resolve its dispute.

In *Imperator Carpet & Interiors, Inc.*, GSBCA No. 6156, 81-2 BCA ¶15,248, the Board stated as follows:

> The United States Court of Claims and agency boards have long refused to accord final decision status to communications from the contracting officer that did not strictly comply with agency regulations. *Id.*, at 75,486.

The Board summarized a contractor's rights and the duty of the contracting officer in *Virginia Polytechnic Institute*, NASA BCA No. 1281-17, 82-2 BCA ¶16,072 (1982) as follows:

> The choice of appeal forums was a substantial right gained by federal contractors with the passage of the Contract Disputes Act. We find that the Government's failure to inform the Appellant of this right contravened the clear statutory and regulatory instruction in this regard. Because that requirement was not met, the Contracting Officer's decision was legally ineffective and did not trigger the start of the filing time for an appeal under the Act. Moreover, since this Appellant could have chosen to proceed either under the Disputes clause or the Act, the deficient

decision will not work a forfeiture of the Appellant's appeal rights under the Disputes clause. *Id.*, at 79,721.

This well-established precedent of the Court of Claims and the Boards dictates that Massman's appeal time pursuant to §§7, 10 and 16 of the CDA has not begun to run since the contracting officer did not advise Massman of its rights. Therefore, the District Court and the United States Court of Appeals for the Sixth Circuit erred as a matter of law in denying Massman its rights to a *de novo* review of its claims against TVA.

2. By holding that Massman waived its rights to elect to proceed under the Contract Disputes Act, the Sixth Circuit has violated the precedent of the Federal Circuit that a contractor must first be advised of its appeal rights and then make a knowing waiver of those appeal rights.

In addition to holding that the contracting officer was not required to apprise Massman of its appeal rights, the Sixth Circuit held that Massman waived its right to elect to proceed under the CDA by not filing a complaint in the District Court within twelve months after receiving the contracting officer's decision. The Sixth Circuit concluded that Massman knew or should be charged with knowledge of the CDA's time limitations and that the failure to file within twelve months "legally forecloses" a CDA election.

The Sixth Circuit's analysis of Massman's alleged waiver of the CDA election conflicts with the well-established precedent of the Federal Circuit and the Court of Claims as well as the various Boards of Contract Appeals. In the leading case of *National Electric Coil v. United States*, 227 Ct. Cl. 595 (1981), the Court of Claims was asked to determine what constitutes an election to proceed under the CDA when a contractor is not advised of its

appeal rights. The Court defined an election as choosing between two or more different and co-existing modes of procedure, and stated as follows:

> In the proceedings at issue here, plaintiff made no informed election in October, 1979, since it had not been informed of the recently enacted provision of [the Contract Disputes Act] and proceeded to appeal to what appeared to be its only forum, the Board. *Id.* at 597.

Accordingly, the Court held that the contractor had a right to elect to proceed under the CDA, just as Massman should be entitled to so proceed.

The Federal Circuit has affirmed and followed the *National Electric Coil* decision in its recent decision of *S. E. R. Jobs for Progress v. United States*, 759 F.2d 1 (Fed. Cir. 1985). In *S. E. R.*, the contracting officer failed to notify S. E. R. that it had any right to elect to proceed under the CDA and only informed S. E. R. of its rights to proceed before the Board within thirty days pursuant to the Disputes Clause and the Department of Labor Regulations. The Federal Circuit held that S. E. R. was not barred from so proceeding because S. E. R. did not make a knowing election under the CDA when it appealed to the Board pursuant to the contracting officer's advice.

Massman's appeal to the TVA Hearing Officer is based on the erroneous advice given it by TVA. Massman did not and could not make a knowing election to proceed under the Disputes Clause to the exclusion of the CDA and thus Massman could not and did not waive its rights to elect to proceed under the CDA just as the Federal Circuit held that S. E. R. had not made such an election or waiver.

The Court of Claims has also rejected the Sixth Circuit's analysis of waiver by constructive knowledge of the

law. In *Roscoe-Ajax v. United States, supra,* the Board followed the Sixth Circuit's analysis and held that the Disputes Clause of the contract placed the contractor on notice of its thirty-day appeal time and that the failure of the contractor to timely file barred its claim. The Court of Claims reversed the Board and held that a governmental agency cannot fail to give a contractor notice as required by statute or regulation. The Court rejected any notion that the contractor was deemed to have knowledge of the Disputes Clause and thereby waive its claim. See also, *Bostwick-Batterson v. United States, supra.*

The right to elect to proceed under the CDA is so fundamental a right that the Board is without jurisdiction to decide a contractor's dispute until it is clear that the contractor made an "informed election." In *Institute of Modern Procedures,* DOT CAB No. 1274, 73-2 BCA ¶16,649 (1983), the Board held that a contracting officer's final decision which failed to advise the contractor of his right to appeal to the Claims Court was defective and totally ineffective as a final decision. Relying upon the leading case of *National Electric Coil v. United States, supra,* the Board held as follows:

> In this case, appellant was prejudiced since it was deprived of the information necessary to make an intelligent election between two forums. *Id.*, at p. 82,784.

Furthermore, in response to the government's argument that its regulations put the contractor "on notice" of its right to appeal to the Claims Court, the Board stated as follows:

> Appellant is not required to trace through a labyrinth of regulations to discover information which those same regulations require the Contracting Officer to provide. *Id.*

The Sixth Circuit's suggestions that Massman "knowingly waived" its right to elect to proceed under the CDA

can not stand in the face of the express language of the CDA, TVA's own regulations and all the decisions that have considered this issue.

3. By discarding the language of the contract which requires the bids to be based on the documents themselves and allowing critical provisions of such documents to be amended by an oral opinion from unauthorized personnel of TVA, the Sixth Circuit has violated fundamental principles of government contract law as defined by the United States Court of Claims and the applicable regulations.

The Sixth Circuit held that the verbal expression of an opinion by a TVA employee to one bidder overrides and changes the start and completion dates of the work as set forth in the contract. This decision entirely changes and to that extent destroys the long-standing bidding process and procedures on government contracts. Massman's contract with TVA expressly stated that Massman could begin work at least by June 15, 1975. The Sixth Circuit held as a matter of law that Massman should not have expected to begin work until October 1, 1975 since a TVA employee (who was not the contracting officer) *orally* expressed an opinion to Massman personnel at a prebid site investigation that the project might not be available until October. This oral representation constitutes the sole basis for the Sixth Circuit's holding that TVA delayed Massman for ten months (October 1, 1975 to August 15, 1976) rather than for fourteen months (June 15, 1975 to August 15, 1975) as Massman contends.

The bidding documents themselves on this project, consistent with the custom and practice in the industry, required the bidders to base their bids on the representations made by TVA in the bidding documents. Any changes in those documents had to be made in *writing* by

addendum and transmitted to all bidders prior to bidding in ample time for each bidder to consider the change in submitting his bid.

Furthermore, in order to assure compliance with this requirement, the law further requires each bidder to file with his bid an acknowledgment of the receipt of each Addendum. This rule has been codified in the federal regulations governing contracting with the government as follows:

> ASPR 2-208 Amendment of Invitation for Bids.
>
> (a) If, after issuance of an invitation for bids but before the time for bid opening, it becomes necessary to make changes in quantity, specifications, delivery schedules, opening dates, etc., or to correct a defective or ambiguous invitation, such changes shall be accomplished by issuance of an amendment to the invitation for bids, using Standard Form 30 (see 16-101), whether or not a pre-bid conference is held. The amendment shall be sent to everyone to whom invitations have been furnished and shall be displayed in the bid room.

Under the applicable regulations and all decisions, any pre-bid change in the start date or completion date or both on this project had to be communicated to all bidders by addendum prior to bidding. This was not done by TVA and instead the Sixth Circuit erroneously gave a verbal opinion expressed by a TVA employee to one bidder the same stature as a written amendment circulated to all bidders.

In fact, the general rule is that the failure on the part of a bidder to acknowledge receipt of an Addendum which affects price, time of completion, quantity or quality by more than a trivial or negligible amount, will render the bid nonresponsive and thus unfit for consideration in the bidding process. 53 Comp. Gen. 64 (1973); Comp. Gen.

Dec. B-170351 (25 Aug. 1970); Comp. Gen. Dec. B-194679 (8 Nov. 1979), 79-2CPD ¶339; Comp. Gen. Dec. B-164154 (3 July 1968).

This concept is so totally engrained in government procurement law that the first sentence in the Special Conditions of the bidding documents on this project states:

> 1. *Rejection of Bids.* In order to make a fair and equitable comparison of the bids, it is very important that all bids be based upon the same contract items and conditions.

The decision by the Sixth Circuit unilaterally and automatically voids this language in the Special Conditions and also the language in Section 2 of the bid documents by which Massman and all the other bidders were advised that they could expect to start work June 15 and that they had to complete the work by December 15, 1975.

The Sixth Circuit has established a dangerous precedent and departure from standard competitive bidding procedures which, if not reversed, would erode the integrity of those bidding procedures by permitting favoritism among bidders who receive specific oral changes in the bid, by allowing bidders in their sole discretion to determine after bid opening whether they will stand by their bids and at the same time necessarily preventing all bidders from bidding and the government from receiving bids based on the same terms and conditions. The Comptroller General has expressed the governing principles in this regard very succintly in Comp. Gen. B-201146 (March 17, 1981), 81-1 CPD ¶202:

> Permitting oral acknowledgment of a material amendment is detrimental to the competitive bidding process in two ways. First, it allows a bidder "two bites at the apple," by giving it the sole discretion to accept or reject the contract after bid opening by affirming or denying that it intended to be bound

> by the amendment and, hence, the agreement. *See, National Investigation Bureau, Inc.*, B-191759, July 18, 1978, 78-2 CPD 44. Second, because of the bidder's failure to timely acknowledge the amendment in writing, the terms of the resulting contract are not clear since the written bid acknowledges the terms of the solicitation, but not relevant amendments. 42 Comp. Gen., *supra*.

In addition to threatening the integrity of the competitive bidding process, the Sixth Circuit's decision directly conflicts with other Courts of Appeals' decisions as well as the decisions of the various Boards of Contract Appeals. Moreover, the Sixth Circuit has created general confusion in an area of law, which prior to this decision, was free of confusion. *Manloading & Management Associates, Inc.*, 198 Ct. Cl. 628, 461 F.2d 1299 (1972); *Sylvania Electric Products Inc. v. United States*, 198 Ct. Cl. 106, 458 F.2d 994 (1972).

Furthermore, the holding by the Sixth Circuit that these oral representations justify a "reasonable" start-up date of October 1, 1975 (three and one-half months after the last possible start-up date allowed by the invitation for bids), is contrary to the various Board cases, such as *Appeal of Ralph Rosedale*, AGBCA No. 441, 77-1 BCA ¶12,334, where the Board rejected the ruling by the Sixth Circuit, holding that it was contrary to

> . . . the well established principle of law that 'parol evidence of negotiations prior to execution of a written contract is not admissible in evidence where the language of the contract is clear and unambiguous. Williston on Contracts - Third Ed. Jaeger, §63. *Pioneer Drilling Company*, AGBCA No. 439, 76-2 BCA ¶12,018.

The Board further stated:

> This Board has recognized that pre-bid instructions, statements or interpretations by the contracting officer

> or his representative, which appear to be in conformity with the provisions of the contract and which do not conflict with or depart from the specifications, may be taken into account in interpreting and administering the contract. *Pioneer Drilling Company, supra; Max Drill, Inc. v. United States* [15 CCF ¶83,691], 192 Ct. Cl. 608, 625 n.6 (1970). This is not a case, however, where the bidder was attempting to determine what the specifications reasonably called for or where there was an ambiguity to be resolved. It was an attempt by Appellant *to vary the terms of a written contract by an oral understanding* with a representative of the Government, and *we find no legal basis for holding that the contract was so modified.* (Emphasis added).

In *Onsrud Machine Works, Inc.*, ASBCA No. 16892, 74-2 BCA ¶10,761 (1974), the Board stated:

> All prior negotiations between the parties to a written contract are superseded by, and merged in, the written instrument itself when finally executed. Therefore, evidence of conversation or negotiations between the parties to a valid written instrument, either prior to or at the time of, its execution is inadmissible to contradict, vary, add to, or subtract from its terms. *Id.* at p. 51,168.

The Sixth Circuit has threatened the very integrity of the competitive bidding process on all government projects by holding that the bid documents on a government contract can be amended by the mere verbal expression of an opinion by an unauthorized government employee to a contractor. This court must reverse the Sixth Circuit to bring it into conformity with the universally recognized law on this and with the well-established precedent of the Court of Claims and the Federal Circuit.

4. The Sixth Circuit's decision erroneously relies on United States v. Rice, 317 U.S. 61 (1942) and conflicts with a series of decisions by the United States Court of Claims which have held the government liable for damages it causes a contractor when the government fails to perform its contractual obligations.

The Sixth Circuit in reliance on its interpretation of *United States v. Rice,* 317 U.S. 61 (1942) denied Massman an equitable adjustment for costs incurred by Massman due to delays admittedly caused by TVA. The Sixth Circuit interpreted *Rice* as barring any recovery for a contractor for costs incurred as a result of delays caused by TVA. The Sixth Circuit's reliance on *Rice* is misplaced and outdated in light of the changes that both the courts and the government have recognized in terms of compensating contractors for delay.

First, the pertinent contract provision in *Rice* states as follows:

> "Article 3. Changes.—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. * * *

The governing language in the contract between Massman and TVA is entirely different from the *Rice* language in that it states as follows:

> *Changes.* The Contracting Officer may at any time, by written order, and without notice to the sureties, make changes in the work within the general scope of the contract, including changes in the drawings and

> specifications. If such changes cause an increase or decrease in the amount of work under this contract or in the time necessary for its performance, *an equitable adjustment will be made in the price or the time allowed for performance or both*, and the contract shall be modified in writing accordingly. (Emphasis added).

There is no statement or provision in this paragraph or any other paragraph of the contract between Massman and TVA that states or intimates in any way that TVA may delay Massman but TVA has no liability to Massman or that Massman is barred from recovering damages for such delay. Furthermore, contrary to the Changes clause in *Rice* which couched the recovery in the alternative, the language in the TVA contract is very precise that Massman may receive *both* an equitable adjustment for all costs incurred and an extension of contract time to perform the work.

The decision of the Sixth Circuit erroneously relies on *Rice* and thus is contrary to decisions of the Court of Claims which have considered this issue. In fact, since *Rice* was first announced, the Court of Claims has continuously and vigorously refused to extend the impact of this Court's decision in *Rice* as the Sixth Circuit has now done. In a decision rendered less than four months after *Rice*, the Court of Claims, in granting recovery for standby costs incurred while the contractor was awaiting delivery of government-furnished equipment, distinguished *Rice* and questioned the wisdom and rationale of the *Rice* doctrine as follows:

> We do not read the case of *United States v. Rice, et al.*, 317 U.S. 61, decided November 9, 1942, as meaning that the Government can, without any privilege reserved in the contract and without any consideration whatever for the damage caused to the contractor, delay the performance of the contract as much as

> it pleases, and pay the bill for damage merely by refraining from assessing liquidated damages against the contractor for his late completion. If the Government should expressly reserve such an unreasonable privilege in its contracts, it would pay heavily for the privilege in the increased amounts of bids which prudent contractors would submit. We see no reason why the Government should want such a privilege, or should be willing to pay for it. And we see no reason why it should get such a privilege without reserving it or paying for it, as we think it did not do in this case.

Diamond v. United States, 98 Ct. Cl. 543, 551-552 (1943).

Thereafter, the Court of Claims initiated a line of decisions granting recovery for costs incurred due to the "fault" of the government in causing the delay and due to the breach of the government's implied obligation not to hinder the contractor's performance. *F.H. McGraw & Co. v. United States*, 131 Ct. Cl. 501 (1955); *J.A. Ross & Co. v. United States*, 126 Ct. Cl. 323 (1953); *Barling v. United States*, 126 Ct. Cl. 34 (1953); *Kehm Corp. v. United States*, 119 Ct. Cl. 454 (1950); *George A. Fuller Co. v. United States*, 108 Ct. Cl. 70 (1947).

In *Cornell Wrecking Company, Inc. v. United States*, 184 Ct. Cl. 289 (1968), the Court of Claims held that where the government failed to release certain buildings for demolition by the contractor within the time set forth in the contract, and where there was no "suspension of work" clause which, in the Court's words "would permit an administrative adjustment of the contract price for these delays," the contractor was entitled to recover its idle equipment and supervision costs attributable to the government's delay. In addition, the contractor was allowed to recover its actual cost of renting equipment for another job when it could not use its idled equipment which otherwise would have been available. *Id.* at 291-92.

Most significantly, the Court ruled for the contractor despite the government's argument that the dates in the contract schedule were stated as "approximate only and . . . subject to adjustments." *Id.* at 292.

Again, the Court in *James P. Purvis v. United States*, 216 Ct. Cl. 398 (1978) similarly held that:

> Although the traditional "suspension of work" clause is absent from the written contract which otherwise contains most of the standard federal procurement clauses, this does not operate to preclude an equitable adjustment reflecting all the claims relating to government caused expenses.

Id. at 401.

The former Court of Claims has by thoughtful decisions through the years laid to rest any concept, including the *Rice* doctrine, that would allow the government to delay a contractor without being liable for the damages necessarily flowing from such delay. The Sixth Circuit has impermissibly resurrected and extended the *Rice* decision to shield TVA from the damages it caused Massman by its own wrongdoing and multiple breaches which extended the time of completion by 684 days. With the *Rice* doctrine still being considered by the Sixth Circuit as a viable legal principle to shield TVA and other governmental agencies from their own wrongdoing which causes substantial harm to contractors, this Court must issue its Writ to correct the Sixth Circuit's error and to clarify this vast area of the law of government procurement.

5. By holding that TVA was not required to sustain its burden of proof as to the downward adjustment from the amount the contracting officer had granted Massman, the Sixth Circuit has violated the well-established precedent of the United States Court of Claims that the burden of proof is on the party seeking reduction.

Although the decision of the Sixth Circuit acknowledged that "Massman experienced, at least, substantial additional costs by reason of the unexpected 10 months delay", two basic errors permeated the entire consideration by the Sixth Circuit as to the amount that Massman was entitled to receive. First, the downward adjustment affirmed by the Sixth Circuit from the amount granted Massman by the contracting officer was contrary to the applicable law. Second, the failure to grant any substantial damages beyond the three month shutdown ignores all the applicable law of this Court and the Court of Claims.

The contracting officer's decision had previously awarded Massman $361,336.00 based solely on the three month suspension of work in 1977. The Sixth Circuit affirmed the Hearing Officer's decision that Massman had to pay back $41,925.00 to TVA even though the damage consideration by the Hearing Officer covered both the three month suspension and the 10-1/2 month delay from October 1, 1975 to August 19, 1976. The Court of Claims and Boards have uniformly held that in seeking to reduce a contracting officer's equitable adjustment, the burden of proof is placed on the party claiming the benefit of the adjustment, in this case TVA. *Bruce Construction Corporation v. United States*, 163 Ct. Cl. 97, 324 F.2d 516 (1963); *Nager Electric Co. v. United States*, 194 Ct. Cl. 835, 442 F.2d 936 (1974); *Victory Construction Co., Inc. v. United States*, 206 Ct. Cl. 274, 510 F.2d 1379 (1975).

In *Triple A Machine Shop, Inc.*, ASBCA 21561, 78-1 BCA ¶13,065 (1978), the Board stated at 63,792, that:

> . . . the Court of Claims Opinion in *Bruce Construction Corporation v. United States*, 163 Ct. Cl. 97, 324 F.2d 516 (1963), mandates payment of Appellant's incurred costs since they are presumed to be reasonable . . . the Court also held that the presumption of reasonableness of actual incurred costs "must be overcome by whichever party alleges its unreasonableness." Since respondent would have us reduce Appellant's claim on the basis that it is too large, respondent has the burden of proving by a preponderance of the evidence that the claim is unreasonable. See . . . *Bromley Contracting Company, Inc.*, ASBCA 20271, 77-2BCA ¶12,715.

Not only did TVA not advance any evidence to support this substantial downward adjustment, but the standard TVA had to meet, which it did not, in order to make such a downward adjustment was to prove it by "a preponderance of the evidence." Clearly, TVA had not done that and the decision by the Sixth Circuit reflects that TVA was not required by the Sixth Circuit to sustain that burden.

6. By refusing to grant Massman substantial damages based on the Hearing Officer's refusal to apportion the damages as to causes attributable to TVA, the Sixth Circuit has violated the well-established precedent that if damages are sustained due to the wrongdoing of TVA, then the Hearing Officer must award those damages.

In addition to the $361,336.00 which the contracting officer found Massman was entitled to receive due to the three month shutdown caused by TVA, Massman also incurred over $1,700,000.00 in additional costs due to the project running 247 days beyond the 215 days of original contract time. The Sixth Circuit affirmed the Hearing

Officer's finding that TVA was responsible for 184 days of these increased costs but Massman was not compensated for the costs attributable to those 184 days. Massman was forced by TVA's actions to rent expensive marine equipment from third parties and to incur rental costs from third parties which the Sixth Circuit found exceeded Massman's costs to use its own equipment by "four times".

Massman incurred $971,667 in extra equipment rental costs for 247 days of delay but the Hearing Officer would not apportion between these days of delay for which TVA was responsible and thus only allowed $119,065. The decision of the Sixth Circuit in this case thus falls within the well-recognized principle that where liability has been clearly established, it is arbitrary and capricious to deny damages simply because the plaintiff's method of cost calculation is unacceptable to the Hearing Officer. *S.W. Electronics & Mfg. Corp. v. United States*, 655 F.2d 1078 (Ct. Cl. 1981).

In the *S.W. Electronics* case, *supra*, the Court of Claims stated that "when confronted with the clear liability of defendant and the plaintiff's efforts to present all available evidence on damages, the board was under a heavy obligation to provide compensation." *Id.* at 1088. Even though the Court found the cost figures confusing, it stated that:

> . . . there is a clear distinction between the measures of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof . . . to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount.

See also Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562 (1931); *Esprit Corp., Inc. v. United States*, CA FC No. 85-2527, 12/17/85.

To recognize a loss of $361,336.00 for a three month delay, only to refuse compensation for a year-long delay because of the method of cost calculation, and then assert that the combination of the two delays resulted in Massman owing TVA $41,925.00 contradicts all the applicable decisions of this Court and the Court of Claims and the writ should be issued to correct this error.

7. The Sixth Circuit's review of the ex parte communications between TVA and the Hearing Officer ignores the denial of Massman's due process rights and contradicts the established rule of law.

The Sixth Circuit erred in affirming the District Court's granting of summary judgment as is evidenced by the Court of Claims' decision in *Baltimore Contractors, Inc. v. United States*, 643 F.2d 729 (Ct. Cl. 1981) in which the Court stated as follows:

> The concept that government contractors are entitled to procedural fairness before a Contract Appeals Board is inherent and implicit in the statutory scheme under the Wunderlich Act for judicial review of Board decisions. The Wunderlich Act makes the decision of a Board of Contract Appeals "final and conclusive unless," among other things, "it is not supported by substantial evidence." 41 U.S.C. §321. *A necessary corollary of that conclusion is that the decision of the Board that is given such finality must have been reached through procedures that are fair to the parties.* *Id.*, at 733. (Emphasis added).

The Court in *Baltimore* also cited *Moore-McCormack Lines v. United States*, 413 F.2d 568 at 581 (Ct. Cl. 1969) in which the Court held that:

> [E]specially if the merits of the determination may be largely shielded from judicial review (as is the situation under the Wunderlich Act) it is essential that proper procedures precede the administrative decision. In those situations, *the right to fair process may be the most meaningful right possessed by the affected parties*, and at the same time, the sharpest goad pressing the decision-maker toward a fair and correct result. *Id.*

The *Baltimore Contractors* case is directly in conflict with the decision reached by the Sixth Circuit especially when one considers that the general counsel of TVA, who made the *ex parte* communications and insisted that the Hearing Officer rule so as to defeat Massman's pending action in the District Court, also totally controlled and dominated the disputes procedures from their inception to TVA's own end by:

(a) selecting the Hearing officer;

(b) evaluating the Hearing Officer as to whether he would be retained or not;

(c) approving what the Hearing Officer would be paid;

(d) advising the Hearing Officer to render his decision denying Massman's claims;

(e) not advising Massman of its right to elect to proceed under the Contract Dispute Act; and

(f) improperly and erroneously advising Massman that it had no rights under the Contract Disputes Act.

The Sixth Circuit acknowledged that *ex parte* communications took place on several occasions, and since neither the contents of these communications nor the fact that they took place were disclosed to Massman when they occurred, Massman was procedurally and substantively prejudiced thereby. The Sixth Circuit has erroneously held that this conduct was not sufficient to set aside the determination of the Hearing Officer since the merits

of Massman's claim was not discussed. The Sixth Circuit overlooked and ignored the fact that TVA's conduct nevertheless gave rise to an impermissible "appearance of impropriety" which entitled Massman to a new hearing before an impartial tribunal. *Gulf & Western Industries, Inc. v. United States*, 671 F.2d 1322 (Ct. Cl. 1982); *Professional Air Traffic Controllers Authority v. Federal Labor Relations Authority* ("*Patco II*"), 685 F.2d 547 (D.C. Cir. 1982).

The conduct by TVA in its handling of this dispute violates all principles of jurisprudence and the Sixth Circuit's decision based on its failure to find a denial of procedural due process clearly warrants issuance of the writ since it contradicts the rule of law established in *Moore-McCormack Lines, supra; Baltimore Contractors v. United States, supra*; and *Gulf & Western Industries, Inc. v. United States, supra*. The Sixth Circuit further erred since the *ex parte* communications were material facts in dispute in the lawsuit and the Court granted summary judgment in violation of Rule 56(c) of the Federal Rules of Civil Procedure. *United States v. Articles of Device Consisting of Three Devices . . . Diapulse*, 527 F.2d 1008 (6th Cir. 1976).

CONCLUSION

For all the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

By R.W. MILLER
MILLER AND BASH, P.C.
4310 Madison Avenue
Kansas City, Missouri 64111
Tel. No. (816) 531-0755
Attorneys for Petitioner

APPENDIX

No. 84-5375

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MASSMAN CONSTRUCTION CO.,
Plaintiff-Appellant,

v.

TENNESSEE VALLEY AUTHORITY,
Defendant-Appellee.

ON APPEAL From the United States District Court for the Eastern District of Tennessee.

Decided and Filed August 13, 1985

Before: MERRITT, CONTIE and WELLFORD, Circuit Judges.

WELLFORD, Circuit Judge, delivered the opinion of the Court, in which MERRITT, Circuit Judge, joined. CONTIE, Circuit Judge (p. 27) delivered a separate concurring opinion.

WELLFORD, Circuit Judge. On March 13, 1975, Tennessee Valley Authority (TVA) awarded Massman Construction Co. (Massman) a contract for excavation of a discharge channel and construction of sheet pile cells at TVA's Raccoon Mountain Pumped Storage Project on the Tennessee River near Chattanooga, Tennessee. The contract initially called for the completion of all work by

December 15, 1975, and contained a standard "Disputes" clause setting out the manner for handling contract disputes in accordance with TVA's usual administrative procedures. The contract price was $2,565,400.00.

Because of project delays, TVA advised Massman not to begin the project until August, 1976. TVA later directed Massman to shut down its dredging and soil operation between April 30 and August 1, 1977 due to environmental concerns and a fish spawning at the location for most of the river excavation and dumping. Massman finally completed all required work under the contract in February of 1978.

Massman subsequently submitted claims for additional costs allegedly caused by these delays in the amount of $1,168,984.00. An exchange of letters ensued between the parties over these substantial claims. A TVA purchasing agent rejected Massman's cost calculations in a letter dated June 4, 1979. On June 20, 1979 Massman appealed to TVA's Director of Purchasing and the Director appointed a representative (James W. McCarter) to consider Massman's claims. On November 20, 1979 the Director's representative decided that TVA was liable for excess costs pertaining to the three-month suspension of excavation. Yet the Director's representative also decided that TVA was not liable for those costs pertaining to the delayed commencement of the work. Massman presented its monetary claims of cost for the suspension of excavation, and the Director's representative ruled that TVA owed Massman a total of $361,336 for the suspended period of 1977.[1]

Claiming additional amounts for the 1977 suspension period and substantial amounts for delay at the onset of

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1. TVA paid Massman the $361,336 award and some additional extras on the job claimed by Massman, a total of $420,667.00.

the job, Massman filed a timely appeal with TVA's General Manager pursuant to the contract's disputes provision. The General Manager appointed Dean Kenneth L. Penegar, of the University of Tennessee College of Law, as his representative to conduct an evidentiary hearing on Massman's claims. In response to Massman's inquiries about hearing procedures, TVA stated by letter on January 18, 1980 that the "only published regulations relating to hearings in TVA contract disputes are those implementing the Contract Disputes Act of 1978."[2] According to the TVA letter, the instant controversy was "not governed by that act [the Contract Disputes Act]" but was to be determined solely under the Disputes clause of the contract.

The parties agreed to separate hearings on the liability and damages aspects of Massman's claims. On August 4, 1980, Dean Penegar opened hearings on liability, wherein TVA contested liability for both the start-up delay and the later suspension of excavation. After presenting evidence, both parties submitted numerous post-hearing briefs. In March of 1981 Dean Penegar issued a decision holding that TVA was liable for costs due to the start-up delay as well as the later work suspension. Dean Penegar scheduled a later damages hearing for which the parties again submitted multiple post-hearing briefs. Almost a year later in 1982, Dean Penegar issued his decision rejecting Massman's damage computations.

Dean Penegar had asked the parties to submit computations in accordance with his decision on issues of liability of TVA. Massman proposed an order for an award of $809,472 in addition to the $420,667 already paid. TVA submitted its computation for a total award of $378,541, which required that Massman return the difference of ap-

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2. 41 U.S.C. §§ 601-613.

proximately $42,000 between the $420,067 already paid out and its proposed award.[3]

Dean Penegar entered a final order on May 27, 1983 essentially accepting TVA's proposed liability calculations and rejecting Massman's calculations. Shortly before the hearing officer's order, Massman filed suit in federal district court against TVA for damages, claiming a lack of procedural fairness in the administrative process, legal errors on the part of hearing officer, and demanding a *de novo* hearing.[4]

The district court subsequently granted TVA's motion for summary judgment. The court rejected Massman's contention that it was entitled to *de novo* hearing of all issues under the Contract Disputes Act of 1978, and instead held that Massman had waived any right to proceed under the Act. The district judge also upheld the administrative decision as neither arbitrary, capricious, nor lacking in substantial fairness. Finally, the court held that an *ex parte* communication by TVA with Dean Penagar, under the circumstances, was no basis to void the decision.

Massman now challenges the district court's grant of summary judgment affirming Dean Penegar's administrative decision. Massman asserts that TVA failed to provide the minimum information necessary for Massman to make a knowing waiver of its right to demand a *de novo* hearing under the Act. Second, regardless of its alleged right to a *de novo* hearing under the Act, Massman

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3. This amount was slightly more than the damages amount calculated by the Director of Purchasing's representative, but the hearing officer considered the case *de novo*.

4. Upon learning of Massman's suit, a TVA attorney contacted the hearing officer to inquire when his decision would be forthcoming. Massman objects to this *ex parte* communication.

asserts that the administrative decision fails to deserve judicial deference due to numerous legal errors as well as an arbitrary and capricious treatment of evidence in the record. Finally, Massman asserts that the court should not have granted summary judgment because material issues of fact exist concerning its procedural fairness claim.

I. Does the Contract Dispute Act apply?

The trial court reached the following negative conclusion with respect to this question:

> Plaintiff's rights to proceed under the Contract Disputes Act are regulated by the provisions of 18 C.F.R. § 1308.4 (1983). This section requires that in all claims involving pre-Act contract disputes initiated after March 1, 1979, a written notice of election to proceed under the Act must be included in the document first requesting a decision by the contracting officer. Plaintiff failed to include such a notice of election in its letter of June 20, 1979, wherein plaintiff first submitted its claim to TVA. Thereby plaintiff waived its rights to proceed against TVA under the Act and is bound by the administrative appellate remedies provided in the Contracts Disputes clause [of the contract]. *See Brown & Root Development, Inc. v. TVA*, 681 F.2d 1313 (11th Cir. 1982).

The trial court failed to discuss Massman's assertion that it did not *knowingly* waive its rights. By inference, however, the court held that Massman was bound by the relevant statutes and regulations regardless of any lack of actual knowledge.

We express reservations about the district court's position that Massman waived its statutory remedy by failing to follow the procedure required under 18 C.F.R.

§ 1308.4. We agree with the district court that 18 C.F.R. § 1308.4 requires all pre-Act contractors who initiate a dispute *after* March 1, 1979, to provide immediate notice of their election to proceed under the Act.[5] There is some question, however, whether Massman had actually initiated the dispute *before* March 1, 1979. It is clear, for example, that before this date Massman had exchanged more than a dozen memos with TVA regarding their claimed cost charges.

On appeal TVA argues that not until after March 1, 1979 date did the varying cost estimates exchanged by TVA and Massman materialize into a "dispute" under the Act. TVA emphasizes that Massman never literally referred to the disagreements with TVA as a "dispute" until June 20, 1979. This first use of the word "dispute" came in Massman's request to the TVA Director of Purchasing to reconsider the purchasing agent's rejection of its final cost estimates.[6]

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5. 18 C.F.R. § 1308.4 states in pertinent part:

(a) A Contractor whose contract is excluded from this part under § 1308.3(b) may elect to proceed . . . with respect to any dispute pending before a Contracting Officer on March 1, 1979, or initiated thereafter . . . .

(b) A Contractor makes an election under paragraph (a) of this section by giving written notice to the Contracting Officer stating that the Contractor elects to proceed with the dispute under the Act. For disputes pending on March 1, 1979, the notice shall be actually received by the Contracting Officer within 30 days after the Contractor receives the Contracting Officer's decision. For disputes initiated thereafter, the notice shall be included in the document first requesting a decision by the Contracting Officer.

6. The Massman letter stated in pertinent part:

The undersigned Massman Construction Co., is your general contractor for the above-referenced project. *A dispute has arisen*, which Mr. George H. Baltz, Supervisor, Construction Equipment and General, Mechanical Section, ruled on by a letter dated June 4, 1979 . . . .

(Emphasis added).

TVA also argues that no dispute was pending with a *contracting officer* before March 1, 1979. TVA points out that 18 C.F.R. § 1308.4(a) refers to "any dispute pending *before a contracting officer* on March 1, 1979 . . . ." The TVA contract with Massman specifically stated that the TVA purchasing agent administering the contract was not "the Contracting officer" for purposes of the disputes clause of the contract.[7] Massman's pre-March 1, 1979 exchanges with purchasing agent Baltz did not therefore technically constitute a controversy before a "contracting officer." The contract instead specified the *Director of Purchasing* as the contracting officer,[8] and Massman did not bring the issue before the Director until the June 20, 1979 letter in which the word "dispute" was used for the first time.[9]

We could thus base a decision on the referenced regulatory language and definitions concerning the lack of any dispute pending on March 1, 1979. TVA, however, published its regulations under the Contract Disputes Act on May 22, 1979—only two weeks before its purchasing agent rejected most of Massman's cost charges and less

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7. In its general conditions, the contract stated:

Contracting Officer. The Contracting Officer shall be the Director of Purchasing, TVA, or his duly authorized representative. *Except for decisions on disputes under the provision entitled DISPUTES*, the Director of Purchasing has designated the Purchasing Agent who administers this contract for TVA as his duly authorized representative to act as the Contracting Officer for all purposes in the administration of this contract . . . .

(Emphasis added).

8. *See id.* In the absence of any specification in the contract, 18 C.F.R. § 1308.2(e) states that a purchasing agent possesses the status of "contracting officer." Yet 18 C.F.R. § 1308.2(j) states that the meaning specified for a term in a contract will take precedence over the usual regulatory definition.

9. The Director of Purchasing then passed the issue to his representative, Mr. McCarter.

than a month before Massman responded by initiating a "dispute" with the Director of Purchasing. Before the belated issuance of TVA's regulations, the language of the Act itself certainly seemed to give contractors in the posture of Massman an open opportunity to proceed under its provisions. The official note on the "Effective Date" of the Act stated that the legislation

> shall apply to contracts entered into one hundred twenty days after the date of enactment [November 1, 1978]. Notwithstanding any provision in a contract made before the effective date of this Act, the contractor may elect to proceed under this Act with respect to any claim pending then before the contracting officer *or initiated thereafter.*

Pub. Law 95-563 § 16, 92 Stat. 2383 (Nov. 1, 1978), 41 U.S.C.A. § 601 (West 1985 Supp.) (Note on "Effective Date") (emphasis added).

We also note the quite different and more equitable treatment of pre-Act contractors with disputes pending before March 1, 1979, under the same TVA regulations. Under 18 C.F.R. § 1308.12(b)(3) TVA is required to include "information about a contractor's right of appeal" under the Act to all such contractors in the final decision of the contracting officer. TVA gave only a somewhat ambiguous reference to the Contract Disputes Act on January 18, 1980 after Massman had inquired about what TVA regulations governed the hearing procedure before Dean Penegar. Without further explanation, TVA's General Manager stated that such regulations (i.e., 18 C.F.R. § 1308 *et seq.*) applied only to disputes under the Contract Disputes Act and that this dispute was not under the Act.

Another circuit has affirmed the constitutionality of these regulations against a similar contractor complaint

about lack of notice and general procedural unfairness. *See Brown & Root Development, Inc. v. TVA,* 681 F.2d 1313 (11th Cir. 1982). Yet in *Brown & Root,* the contractor had more than two and a half months to discover and master the intricacies of the new TVA regulations concerning election under the Act. Here the contractor had less than thirty days to ascertain its rights. Under the circumstances, we have difficulty holding that Massman made a knowing waiver of its right under the Act. Such a holding would seem contrary to the view stated in *S.E.R. Jobs for Progress v. United States,* 759 F.2d 1, 3 (Fed. Cir. 1985), and *National Electric Coil v. U.S.,* 227 Ct. Cl. 595, 597 (1981), that the contractor must make a "knowing election" before waiving its rights under the Act.

We rather state as grounds for our decision that Massman has waited too long for institution of action *under the plain language of the Act itself.* The TVA representative issued a final decision on November 20, 1979, more than a year after the Contract Disputes Act became law. And regardless of the import of TVA regulations issued pursuant to the Act, the contractor should have been put on notice by the language of the Act that *any action* seeking judicial review under the Act itself *shall be filed* within a year from its receipt of the contracting officer's decision. The Act clearly states:

> (2) In the case of an action against the Tennessee Valley Authority, the contractor may only bring an action directly on the claim in a United States district court pursuant to section 1337 of Title 28, notwithstanding any contract provision, regulation, or rule of law to the contrary.
>
> (3) Any action under paragraph (1) or (2) *shall be filed within twelve months from the date of the re-*

> *ceipt by the contractor of the decision of the contracting officer* concerning the claim, and shall proceed de novo in accordance with the rules of the appropriate court.

41 U.S.C. §609(a)(2) and (3) (emphasis added). Massman's complaint was not filed until March 17, 1983, some forty months after its receipt of the contracting officer's decision. It is thus evident that Massman has failed to comply with the statutory requirement. Massman argues that TVA's refusal to provide adequate notice about the procedural regulations issued pursuant to the Act excuses its failure to seek timely judicial review under the statute. We are not persuaded; TVA's actions had no effect that could hide the plain language of the statute which precludes Massman's demand for a *de novo* hearing under the Act.

It seems clear in this record that Massman knowingly chose to present its claims pursuant to the contract's Dispute clause. The hearing officer then considered the evidence independently from the contracting officer's prior decision. We find that Massman 1) had a full and fair opportunity to present its case administratively, 2) knew or should be charged with knowledge of the Contract Dispute Act's time limitations, and 3) at least was apprised of the existence of promulgated regulations. Thus Massman's failure to claim the applicability of the Act in a timely fashion legally forecloses that claim. Massman has also failed to persuade us of any equitable entitlement to "another bite of the apple" by *de novo* review under the circumstances of this record, especially in view of the Act's purpose of facilitating "speedy and efficient resolution" of public contract disputes.

II. Should the decision of the hearing officer be affirmed?

The contract disputes clause states that the hearing officer's decision is "final and conclusive . . . except on questions of law" or unless determined to be "fraudulent or capricious or arbitrary" or "grossly erroneous" or "not supported by substantial evidence." This variegated but definitely limited contractual standard of review has been approved by the courts. *See Crass v. T.V.A.*, 460 F.Supp. 941 (E.D. Tenn. 1978), *aff'd*, 627 F.2d 1089 (6th Cir. 1980). This limited review is mandated also by 41 U.S.C. §§ 321-322. *See Crown Coat Front Co. v. United States*, 386 U.S. 503, 513 (1967) (discussion upon review of a similar disputes clause.) The burden, of course, is upon Massman to establish that the administrative findings are "grossly erroneous" or unsupported by "substantial evidence." *Algonac Mfg. Co. v. United States*, 428 F.2d 1241, 1251 (Ct. Cl. 1970) (using substantial evidence standard); *Milmark Services, Inc. v. United States*, 731 F.2d 855, 857 (Fed. Cir. 1984) (opting for clearly erroneous standard).

Dean Penegar's March 3, 1981 decision after a full evidentiary hearing concluded that (1) the delay in starting work "was TVA's responsibility—so far as the contractor's escalation in costs because of that delay is concerned," and (2) "interruption of dredging and spoiling for three months in 1977 was also chargeable to TVA . . . ." Thus, the hearing officer originally decided the two liability issues submitted to him substantially in favor of Massman.[10]

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10. TVA does not contest, on appeal, the hearing officer's determination of October 1, 1975, as a "start date for purposes of computing damages," although it took the position at the administrative appeal that it should not be liable for any delay in starting the project.

Dean Penegar, however, did not adopt Massman's contentions about the extent of TVA's liability. Massman claimed a fourteen month delay at the outset (from June 15, 1975 to August 18, 1976).[11] The hearing officer decided that TVA was chargeable with a ten month delay (October 15, 1975 to August 18, 1976) at the outset, finding that Massman knew upon visiting the construction site before making its bid that the work "could not begin before October 1, 1975." He noted further that the "expected" beginning date of June 15, 1975 was specifically "not guaranteed."[12] Thus, despite the fact that "time was

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11. Massman also claimed that it was expecting a full-scale equitable adjustment in the contract price due to the TVA's purchasing agent's promise concerning the delays in a letter dated October 28, 1975. Massman argued that it would not have gone through with the job without such a promise of a major equitable adjustment. The hearing officer found that the TVA agent possessed *apparent although no actual* authority to promise a full-scale equitable adjustment rather than mere breach of contract relief. As discussed *infra* at A20-22, the hearing officer found no actual authority because the contract did not call for full-scale equitable price adjustments due to delay. He also ultimately rejected the argument of equitable estoppel against TVA due to Massman's failure to prove that it detrimenally relied on the agent's unjustified promise and would not have performed the contract otherwise. This determination by the hearing officer is not clearly erroneous.

12. The contract specifically stated that the June 15, 1975 starting date was "expected and not guaranteed." In an April 23, 1975 letter, Mr. John Massman, president of the appellant construction firm, also acknowledged to TVA's purchasing agent that at an earlier meeting "we were informed that because of scheduling problems and delays TVA is having, our initial start-up on the contract will be delayed until after January 1, 1976." He further acknowledged that earlier when looking at the project before the Massman bid was accepted, a TVA agent "had informed our personnel that it may be October 1st before any work could commence. . . ." Massman added in this April 23 letter that we "feel that the bidding documents indicated that the work would proceed *sometime during 1975* and that our bid had to be based on some time frame . . . . [emphasis added]." In August 1975 TVA responded to Massman in a letter that the "estimated date for beginning work" was "about April 1, 1976." In October 1975, TVA amended this start-up estimate to a starting date not before August 15, 1976.

of the essence" and that a 215 day job length time was specified, Dean Penegar found that TVA's delay until October 1975, was not a basis for liability.

The findings of the hearing officer regarding this issue are not demonstrably erroneous. We also affirm the legal conclusion that there was unreasonable delay on TVA's part for no more than approximately ten months. *See Parrish v. United States*, 120 Ct.Cl. 100, 98 F. Supp. 347, 348 (1951), *cert. denied*, 342 U.S. 953 (1952) (distinguishing between delay caused by government's "want of diligence" and delay "resulting from the exercise by the government of some right reserved to itself [in contract]").

Massman also seems to contend that the decision must be deemed arbitrary and capricious simply because the hearing officer ultimately awarded Massman less damages than did the representative of the TVA contracting officer. We cannot agree with this argument. The Disputes clause in the contract stated that the hearing officer's decision was to be "upon the basis of the evidence presented at the hearing" before him. He was not necessarily bound by the evidence presented to or the findings made previously by the TVA representative. We will thus consider only the specific damages findings about which Massman complains.

A. Equipment expense (apart from the 1977 three month suspension).

Massman makes this major complaint:

> Massman incurred $726,212.00 worth of equipment expenses, which was mainly equipment rented from third parties, for the 274 days of delay beyond the 3 month shutdown. Although the hearing officer found 184 days of delay for which Massman was

> entitled to an equitable adjustment for such items as direct and indirect labor, the hearing officer failed and refused to grant Massman even one dollar for this equipment rental for 1 day, let alone the 274 claimed days of delay or the 184 days of compensable delay acknowledged by the hearing officer. The failure to so compensate Massman for equipment costs incurred during this period of delay is a clear error of law subject to *de novo* review.

First, in addressing this issue, we disagree that the alleged "failure to compensate" for added equipment rental expenses was an "error of law," and we have already decided that Massman is not entitled to *de novo* review. Massman must show that hearing officer Penegar's decision in this respect was either "grossly erroneous" or was not based on "substantial evidence." Dean Penegar found Massman's "days-of-total-delay approach generally unacceptable" because there were other contributing factors to Massman's claimed increased costs besides TVA's actions in postponing the start-up of the project and suspending the ongoing operations. He concluded that Massman must establish TVA's breach in causing start-up delay as "a substantial factor in causing the injury" in form of claimed damages generally and as to extra equipment expenses. He further concluded in this respect:

> There has been no clear and specific showing of loss arising out of the original delay by TVA. The owned equipment of Massman was released to other Massman jobs early enough apparently to obviate any idling loss it may have incurred during this period of time. And with respect to the claim for rental payments. Massman's own witness has shown that there was an equivalent gain to Massman in the use of its cheaper

equipment on the other jobs—presumably during any and all of the times in question in this dispute.

As indicated by Dean Penegar, Massman's damages theory emphasized the difference in its expected costs for use of owned equipment and actual rental costs after the delay. In support of its contention for "outside equipment rent," Massman submitted a worksheet indicating "actual rental costs" of $882,629.50 for eight items, including $415,292.50 for a Lima Crane Barge, and the balance for other barges and scows allegedly utilized for varying monthly periods. Offset from this total was a figure for "expected owned equipment," including four items only, three barges and one scow (three of them for a maximum of ten months) of $198,215. Added to the total claim in this regard was an insurance expense for certain equipment of $47,800. A net "extra cost" figure of nearly $317,000 was claimed to have been expended on the Lima Crane Barge rented for about 12 months, whereas Massman's ten month expected "owned rate" for comparable equipment was set out to be less than one-fourth of that total.[13]

Massman's president testified that if the firm had been able to start the job in October of 1976, it would have "anticipated having to rent *some*" of the listed rental equipment (emphasis added). He also testified, however, that "we expected to utilized [sic] some certain items of equipment for less time than we did utilize it." In testifying specifically about the Lima Crane Barge, Massman

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13. Massman's president testified that if work started on October 1, 1975, he would have expected to have completed the project in 287 days due to added construction requirements during the job. TVA amended this original schedule of 215 days by allowing 52 days extra. Massman testified that his firm actually took 306 days to perform, including "the extra assigned work by TVA."

said it was "utilized as a result of our not having owned equipment available to utilize on the project." The Lima equipment was described as "the big machine that was used to perform all the excavation work."[14] The "monthly owned rate" applied by Massman to equipment allegedly comparable to the rented Lima Crane Barge was $9,860 a month (in contrast to the $30,000 a month rental allegedly paid). This expected rate for owned equipment "basically . . . represents equipment depreciation . . . inter company entries that we establish in an overall pool . . . ." Massman's president testified that appellant had 15 or 20 cranes at the time with life expectancy of from four to eight years, and that the rates paid for the rented Crane Barge and the Drill Barge were "certainly high rates," and that the rented equipment, like Massman's owned equipment, was not new.[15]

Dean Penegar concluded that Massman had proven an insufficient causal connection between its claim for substantial extra costs regarding initial delay in respect to major equipment. Like the TVA contracting officer representative, however, Dean Penegar allowed Massman an extra amount for "the difference between the monthly

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14. With respect to an "EHB Barge," however, for which Massman sought to claim $11,788 as a damage claim item, its president testified that this was "owned" not rented equipment. This testimony seems inconsistent with the listed claim for extra barge rental costs.

15. It should also be noted that in Massman's written claim submitted to TVA's purchasing agent Baltz on October 31, 1978, the total amount set out for "equipment escalation" was approximately $498,762 for "additional rental." This, to be sure, did not include all "additional third party equipment on the job," or the mobilization charge of $25,000, but did include the major category of additional equipment items, such as the Lima Crane Barge, the Drill Barge, and other "Rig Barges." The cost of insurance claimed "for the time rented" was $37,805 instead of $47,800. Massman does not attempt to explain these discrepancies in its claims at different times.

rental of the four pieces of equipment in question . . . . for three months on the one hand and the projected owner charges for the equivalent equipment for those three months . . ." We find substantial evidence to support this latter finding with respect to the 1977 summer interruption.

On the other hand, we must examine the record carefuly in respect to the hearing officer's disallowance of *any* claimed damage for the ten month beginning delay by TVA. The existence of some substantial damages seems inevitable during a ten-month delay regardless of the inadequacies of proof. Our analysis, nevertheless, must be guided by the indisputable legal principle that the burden to prove such actual damages lies squarely on the plaintiff. As the Court of Claims (now Federal Circuit) stated in *Wunderlich Contracting Company v. United States*, 351 F.2d 956, 968-69 (Ct. Cl. 1965):

> A claimant need not prove his damages with absolute certainty or mathematical exactitude. *Dale Construction Co. v. United States*, No. 134-57, Ct.Cl., December 11, 1964; *Houston Ready-Cut House Co. v. United States*, 96 F.Supp. 629, 119 Ct.Cl. 120 (1951). It is sufficient if he furnishes the court with a reasonable basis for computation, even though the result is only approximate. *F. H. McGraw & Co. v. United States, supra* [130 F.Supp. 394 (Ct. Cl. 1955)]; *Locke v. United States*, 283 F.2d 521, 151 Ct.Cl. 262 (1960). Yet this leniency as to the actual mechanics of computation does not relieve the contractor of his essential burden of establishing the fundamental facts of liability, causation, and resultant injury. *River Construction Corp. v. United States, supra; Addison Miller, Inc. v. United States*, 70 F.Supp. 893, 108 Ct.

Cl. 513 (1947), *cert. denied*, 332 U.S. 836, 68 S.Ct. 217, 92 L.Ed. 408 (1947); *J. D. Hedin Construction Co., Inc. v. United States, supra*, 347 F.2d at pp. 246-47 [Ct. Cl. 1965].

In *Wunderlich* the plaintiff contractor experienced numerous unforeseen delays at least partly attributable to the government. The contract consequently took 318 days longer than expected to complete. The *Wunderlich* court thus directly addressed the question whether a substantial damage amount can simply be *presumed* from this kind of long delay. The *Wunderlich* court rejected the appropriateness of any such presumption by stating:

> It was plaintiffs' obligation in the case at bar to prove with reasonable certainty the extent of unreasonable delay which resulted from defendant's actions *and to provide a basis for making a reasonably correct approximation of the damages which arose therefrom.* [Citations omitted.] Broad generalities and inferences to the effect that defendant *must* have caused some delay and damage because the contract took 318 days longer to complete than anticipated are not sufficient. [Citation omitted.] *Id.* at 969. [First emphasis added; second emphasis in original.]

Stripped of any presumption favoring the existence of damage, Massman's presentation of proof is, unfortunately, inadequate. Massman's damage calculations are essentially based on net differences between the lower cost originally expected for using its owned equipment versus the higher cost actually incurred to rent equipment in light of the delay and consequential release of its owned equipment. As Dean Penegar's decision rightly suggests, however, this kind of calculation fails to provide a realistic estimate because it assumes that Massman's owned equipment was

idle during the delay. In fact, however, Massman's president testified that his company transferred its owned equipment to other jobs soon after being informed of the delay in October 1975.

We can plausibly imagine that Massman experienced, at least, substantial added costs by reason of the unexpected 10 month delay at the outset for maintaining, transporting and transferring equipment, and lay-up expenses. On the other hand, Massman may have experienced significantly lower equipment costs on these other jobs due to its unexpected use of owned rather than rented equipment. Massman had the clear burden to present these cost and expenses estimations and prove a reasonable basis for its damage calculations. *Wunderlich, supra.*

There is some relevant evidence in this record supporting Dean Penegar's ultimate finding of failure to prove a significant loss on Massman's part. Its president testified that the cost spread between rented and owned equipment on the other jobs represented "a similar difference in rates" to the spread between rented and owned quipment at the TVA job. Thus it is uncertain that Massman must surely have experienced a substantial loss and the extent of such loss. In the absence of any clear and persuasive cost explanations, we decide that Dean Penegar was not clearly or grossly wrong in finding that Massman has made "no clear and specific showing of loss" here, at least with respect to the difference in rental rates paid and what was anticipated with respect to the use of owned heavy equipment.

In fairness, however, it seems uncontrovertible that the movement to and from the Tennessee River site involved considerable heavy equipment owned by Massman. Actual expenses incurred in holding over personnel and equip-

ment for the ten months delay period may have involved considerable loss or damage to Massman, apart from claimed allocation of office administrative or overhead expense generally.[16] We will remand the case, therefore, to the district court for resubmission to the hearing officer for another limited damages determination. The hearing officer should specifically consider Massman's possible damages with respect to moving, transfer and transportation costs and lay-up costs for the ten month delay period incurred by Massman. Such allowable damages, if any are proved, would be in addition to the damages award already made by the hearing officer. We afford this opportunity in the interest of justice since we affirm otherwise the decision with regard to major equipment expenses.

B. Other Costs Specifically Identified by Massman

Massman has identified four other cost areas in which it was allegedly deprived of damages by Dean Penegar. These are the following:

(1) Denied Profit of $148,304:

Massman claims that it was due $148,304 profit as an "equitable adjustment" under the contract.

In a suit for breach of contract plaintiffs are not ordinarily entitled to *profit* on the amount of their damages. *See Torres v. United States*, 126 Ct. Cl. 76, 79, 112 F. Supp. 363, 365 (1953). A possible exception is the situation where a contract contained a "suspension-of-work" or otherwise specifically-designed "constructive change" clause. *See, e.g., Bennett v. United States*, 371 F.2d 859

16. On these costs, see *infra* at A22-24.

(Ct. Cl. 1967). Dean Penegar, however, found no such exceptional clause in the contract. Thus he held that delay was a mere *breach of* rather than an *"equitable adjustment" under the contract* and no profit could be recovered.

Massman responds that a "Changes" clause in the contract actually does allow an equitable adjustment for profit. This Changes clause reads as follows:

> *Changes.* The Contracting Officer may at any time, by written order, and without notice to the sureties, make changes in the work within the general scope of the contract, including changes in the drawings and specifications. If such changes cause an increase or decrease in the amount of work under this contract *or in the time necessary for its performance,* an equitable adjustment will be made in the price or the time allowed for performance, or both, and the contract shall be modified in writing accordingly. All claims by the Contractor for adjustment under this paragraph must be asserted within 30 days from the date the change is ordered, and in the meantime, the Contractor shall proceed with the work as so changed. [Emphasis added.]

Massman's argument about this "Changes" language, however, is principally refuted by *United States v. Rice,* 317 U.S. 61 (1942), wherein a Changes contract clause strikingly similar to the instant one was in dispute.[1] The court ruled that the Changes clause did not encompass equitable money adjustments for mere delay. The virtually identical contract language in *Rice* about "time" for completion of project simply protected the contractor from *losing the contract* if work was delayed by the government and the contractor thus could not complete the project within the time specified. *Id.* at 66-68.

We affirm, therefore, the denial of an "equitable adjustment" profit item under the circumstances.

(2) Denied home office expenses of $83,946 including $20,453 during suspension of work.

Dean Penegar again rejected Massman's damage claims here as inadequately substantiated. He emphasized that Massman's proof was devoid of the required demonstration that home office work could not have been transferred to other projects during the ten-month delay. *See, e.g., W. G. Cornell Co. v. Ceramic Coating*, 626 F.2d 990, 993 (D.C. Cir. 1980). For the most part, Massman has not persuasively disputed this conclusion.

The testimony of Massman's president is quite instructive here. Massman essentially derived its home office expenses claim by indicating that these costs represented six (6%) percent of total work cost. Massman's own legal counsel began his questioning of Massman by saying:

> Q. Now, Mr. Massman, I want to direct your attention back to Exhibit 79, Item Number 13, and point out to you that represents home office expenses and indicates a six percent. *There is no backup data within Exhibit 79 for that, is there, Mr. Massman?*

(Emphasis added). Massman answers "No, Sir," although he goes on to insist that this 6% figure was derived from "audits" by such entities as the Corps of Engineers and Ernst & Whinney. Dean Penegar finally broke in to question the support for this figure. He succeeded in getting the president to make this admission:

> *THE HEARING OFFICER*: Pardon the expression, but is this [the overhead expense calculation] for your pain and suffering?

THE WITNESS: The pain and suffering is down under the interest. But, this is part of the pain and suffering, yes, sir.

THE HEARING OFFICER: Dealing with these claims?

THE WITNESS: Now, maybe it's not — maybe I misunderstood pain and suffering.

Massman's counsel then broke in and vainly attempted to shore up Massman's position.

Massman claims that the hearing officer's decision effectively rescinded the TVA purchasing agent's original award of $20,453 for established home office expenses during the later three-month suspension. Dean Penegar acknowledged that home overhead expenses represented a more plausible cost during the three-month suspension. It would also seem that the representative of the TVA contracting officer found some reasonable basis for computing the $20,453 amount. Equitably, then, Massman should be allowed to present very specific evidence on this limited issue upon remand and resubmission to the hearing officer.

(3) Denied Interest of $553,524:

Interest on claims against the United States cannot be recovered in the absence of an express provision to the contrary in the relevant statute or contract. 28 U.S.C. § 2516(a); *United States v. Alcea Band of Tillamooks*, 341 U.S. 48 (1951). Massman nevertheless cites *L. L. Hall Constr. Co. v. United States*, 379 F.2d 559 (Ct. Cl. 1966), as standing for the principle that an interest judgment is available because TVA was performing the contract in a proprietary rather than sovereign capacity. The *Hall*

opinion, however, does not even address the issues of prejudgment interest or the proprietary status of government contracting. We also note that the Supreme Court has questioned in similar contexts the significance of any distinction between the federal government's "proprietary" versus "sovereign" functions. *See, e.g., Federal Land Bank v. Board of County Comm'rs*, 368 U.S. 146, 150-51 (1961). A number of circuits have also refused to award prejudgment interest for delay and/or extra cost in private construction cases because damages are usually not liquidated or otherwise readily ascertainable. *See, e.g., E. C. Ernst, Inc. v. Manhattan Constr. Co.*, 551 F.2d 1026, 1042 (5th Cir.), *reh'g denied in part, granted in part on unrelated issue*, 559 F.2d 268 (5th Cir. 1977), *cert. denied, sub nom. Providence Hospital v. Manhattan Constr. Co.*, 434 U.S. 1067 (1978). We have been presented no persuasive argument for distinguishing these cases and awarding prejudgment interest; accordingly, it is denied.

(4) Supervisory Wages

Dean Penegar accepted Massman's increased cost charge for wages of field employees ($9,303), but he found that the much larger claim of $54,794 for *home office payroll* was lacking in evidentiary support. Massman here also specifically complains that Dean Penegar's decision was so sweeping as to take back $12,208 granted by the purchasing agent for supervisory wages during the three-month delay. We find the record unclear as to this specific charge and the basis of disallowance. We would remand for specific reconsideration and treatment of this claim that the hearing officer's decision swept too broadly and improperly reduced the award here for the three-month suspension by $12,208.00.

III. Whether Material Issues of Fact Still Existed Concerning the Fairness of the Administrative Process that TVA Provided to Massman.

Massman argued to the district court that the general structure of TVA's administrative claims process violated basic principles of procedural fairness. On appeal Massman again argues that "TVA must be barred . . . from setting its own guidelines and standards on how disputes with TVA will be judged from its own selected and controlled forum."

Massman cites no case law bolstering this comprehensive procedural due process argument against TVA's administrative process. The District of Columbia circuit, citing a wealth of case law, rejected a substantively similar claim in *Jonal Corp. v. District of Columbia*, 533 F.2d 1192 (D.C. Cir.), *cert. denied*, 429 U.S. 825 (1976). The complaint there was that the District of Columbia Corporation Counsel was able to choose the administrative board *and* the attorney defending the municipal corporation against claims of contractors. The court held that this structure "does not, *per se* constitute a violation of the due process clause of the Fifth Amendment." *Id.* at 1197. Following *Jonal*, we hold that the district court was correct to reject Massman's complaint against the general administrative structure of the contract's dispute procedure as lacking procedural fairness.

Thus Massman is relegated to the claim of actual bias rising to the level of a due process deprivation in this particular case by virtue of the *ex parte* administrative communication. The problem here is that Massman simply does not respond in a convincing fashion to the district court's specific holding that the *ex parte* communications

were not prejudicial and thus not legally significant enough to bring about a due process violation.

The uncontroverted testimony in the record indicates that TVA contacted Dean Penegar simply for discovering when his long-awaited damages decision was to be issued. Massman's brief goes so far as to argue that "the depositions of key TVA employees make it *abundantly clear* that 'the merits' of the case were discussed [in the *ex parte* communications] . . . ." Massman provides no discussion or analyses of these depositions. Instead, it makes only one fleeting reference to one deposition. The testimony there of the TVA Associate General Counsel involved, however, emphasizes that the merits of the case were not discussed. He stated that TVA inquired only about when Dean Penegar was planning to issue a final decision.

We note, as did the District of Columbia circuit in *PATCO v. Federal Labor Relations Authority*, 685 F.2d 547 (D.C. Cir. 1982), that a procedural or "status report" inquiry by a party is not an "*ex parte* communication" as defined by the Government In The Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241 (1976). The Act defines *ex parte* communication as

> an oral or written communication not on the public record to which reasonable prior notice to all parties is not given, but . . . *not includ[ing] requests for status reports on any matter or proceeding.*

(emphasis added); 685 F.2d at 563, citing 5 U.S.C. § 551 (14). Thus a mere request for a status report from Dean Penegar does not rise to the level prohibited by this statutory definition of *ex parte* communication.

On the other hand, however, the D. C. circuit cited from a passage of the legislative history of the Act, which notes that

> A request for a status report or a background discussion may in effect amount to an indirect or subtle effort to influence the substantive outcome of the proceedings. The judgment will have to be made whether a particular communication could affect the agency's decision on the merits. In doubtful cases the agency official should treat the communication as ex parte so as to protect the integrity of the decision making process. S. Rep. No. 354, *supra*, at 37, Sunshine Act Sourcebook at 232. *Accord*, H.R. Rep. No. 880, Pt.I, *supra*, at 20-21, Sunshine Act Sourcebook at 531-32.

685 F.2d at 563.

This passage from the legislative history of the Sunshine Act makes clear that even one-sided "status report" inquiries are to be discouraged. On analysis of this record, however, we agree with the district court that there is no support for the view that TVA's actions, although unwise and without notice to the adversary party, could rise to the level of a due process violation. TVA's communication with Dean Penegar did not deprive Massman of a fair hearing under the circumstances of this record.

CONCLUSION

In most respects we affirm the actions of the hearing officer and those of the district court with regard to this longstanding controversy. In respect of the limited remand as to certain damage claims, we hope that the parties will seek to settle and resolve these remaining

relatively minor disputes in light of the length of time already elapsed in the administrative stages of the controversy and also in view of the time involved in the judicial disposition of the issues.

In summary, then, we AFFIRM the district court in its holding that the Contract Disputes Act of 1978 does not apply and that Massman is not entitled to a *de novo* hearing. We also AFFIRM the district court's ruling that Massman received essentially a fair administrative hearing untainted by TVA's *ex parte* communication with the hearing officer. We find no clear error in the decision that TVA was responsible for the ten-month delay at the outset and for the later three month delay; but that Massman generally failed to prove its major claims for damages, particularly with respect to the extra major equipment costs and rentals. We REMAND, in the interest of justice, only (1) to permit an assessment of the moving transportation, and lay-up costs entailed by Massman in being required to transfer major equipment to the job site for an anticipated 1975 beginning and then sending this equipment on to other jobs in 1975 to mitigate damages for the delay, (2) to permit a determination of Massman's actual costs and expenses entailed in keeping and maintaining necessary personnel and other equipment, if any, at the TVA job site for the ten months period from October 1975 to August 1976 before the actual beginning of the job, and (3) to permit Massman's presentation of specific evidence establishing that the hearing officer's holding against home supervisory wages and overhead expenses claims swept too broadly with respect to the purchasing agent's original award of $20,453 for overhead expense and $12,208 for home supervisory wages during the three-month suspension.

Each party will bear its own costs.

CONTIE, Circuit Judge, concurring. I agree with Judge Milburn that Massman failed to affirmatively elect to proceed under the Act as required by the statute and regulations. "These regulations were published in the Federal Register and the Code of Federal Regulations, have the force and effect of law, and all persons affected thereby are charged with legal notice of their provisions." *Adamsville Lumber Company, Inc. v. Rainey*, 348 F. Supp. 373, 376 (W.D. Tenn. 1972) (Wellford, J.).

Accordingly, I concur in the judgment of the court and Parts II and III of the opinion.

(Filed October 28, 1983)

IN THE
UNITED STATES DISTRICT COURT FOR
EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

CIV-1-83-118

MASSMAN CONSTRUCTION COMPANY,
Plaintiff,

vs.

TENNESSEE VALLEY AUTHORITY,
Defendant.

ORDER

This cause is before the Court upon the defendant's motion for summary judgment (Court File #2). In accordance with the Memorandum entered herewith, it is ORDERED that said motion be granted, and judgment is hereby entered in favor of defendant.

ENTER:

/s/ Ted Milburn
United States District Judge

(Filed October 28, 1983)

IN THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

CIV-1-83-118

MASSMAN CONSTRUCTION COMPANY,
Plaintiff,

vs.

TENNESSEE VALLEY AUTHORITY,
Defendant.

MEMORANDUM

This action involving a public construction contract was filed by plaintiff, Massman Construction Company, after the hearing officer appointed pursuant to the contract's "Disputes Clause," rendered a decision unfavorable to plaintiff. Plaintiff contends that this case is governed by the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613 (1982) and that plaintiff is therefore entitled to appeal the contracting officer's decision to this court for *de novo* review. In the alternative, plaintiff contends that the decision rendered by the hearing officer was arbitrary, capricious and not supported by substantial evidence and that pursuant to the Wunderlich Act, 41 U.S.C. §§ 321-322 (1982), plaintiff is therefore entitled to a trial *de novo* of its claim against TVA. The case is before this Court upon the defendant's motion for summary judgment (Court File #2). For the following reasons, this Court is of the opinion that said motion should be granted, the defendant being entitled to judgment as a matter of law.

BACKGROUND

On January 21, 1975, Massman Construction Company ("Massman") submitted its bid on a project for the Excavation of Discharge Channel and Construction of Sheet Pile Cells at TVA's Raccoon Mountain Pumped Storage Project (hereinafter referred to as the "project"). On March 13, 1975, TVA awarded the contract for the project to Massman in the amount of Two Million Five Hundred Sixty-five Thousand Four Hundred Dollars ($2,565,400.00). The contract for the project was designated as Contract 75K35-75800 and specifically required all work to be completed by December 15, 1975. The contract contained a "disputes clause" which set out the manner in which contractual disputes were to be handled.[1] In October, 1975,

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1. The contract contained the following standard "Disputes" clause:

> 16. DISPUTES. Any dispute arising out of or connected in any way with any obligation of the parties arising out of the performance or non-performance of the contract whether arising before or after completion of performance, including disputes as to any alleged violation or breach thereof, which is not settled or disposed of by agreement of the parties shall be decided by the Contracting Officer on the basis of the contract file and any other facts which he may deem pertinent. The Contracting Officer shall reduce his decision to writing and promptly mail or otherwise furnish a copy thereof to the Contractor. Within thirty (30) calendar days from the receipt of such copy, the Contractor may appeal by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to TVA's General Manager. After the filing of such an appeal the General Manager or a representative or representatives designated by him shall conduct a hearing at which both TVA and the Contractor shall be afforded an opportunity to be heard and to offer evidence relating to the dispute. The General Manager or his representative or representatives shall arrive at a decision upon the basis of the evidence presented at the hearing.
>
> The decision of the General Manager or his representative or representatives shall be final and conclusive upon the

(Continued on following page)

TVA advised Massman that it could not start the project until August, 1976, and Massman began work on the project at that time. After Massman began work on the project TVA directed Massman to shut down its dredging and spoil operation between April 30 and August 1, 1977. Massman completed all work required by the contract and left the project on February 22, 1978.

By letter dated June 20, 1979, Massman submitted its claim to TVA in the amount of One Million Seven Hundred Forty-two Thousand Nine Hundred Ninety-seven Dollars ($1,742,997.00) for additional costs which Massman contended it incurred because of TVA's changes in the contract. The contracting officer of TVA who decided Massman's claim entered his final decision on November 20, 1979. On December 3, 1979, Massman filed its notice of appeal from the decision of the contracting officer and inquired of the contracting officer as to the procedural rules published by TVA for an appeal. Herbert Sanger, General Counsel for TVA, replied to Massman's inquiry. Mr. Sanger advised Massman that its appeal would be conducted before a hearing officer appointed by TVA's General Manager.

Footnote continued—

> parties except on questions of law or unless determined by a court of competent jurisdiction to have been fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence: provided, that until such time as an appeal is taken to the General Manager and he (or his representative or representatives) renders a decision, the decision of the Contracting Officer shall govern the respective rights and obligations of the parties as to the matter in dispute and the Contractor shall proceed diligently with the performance of the contract in accordance with said decision; and provided further, that if no appeal to the General Manager is made within the time and in the manner prescribed above, the decision of the Contracting Officer shall be final and conclusive upon the parties.

By letter dated January 18, 1980, TVA appointed Kenneth Penegar, Dean of the University of Tennessee School of Law, as the hearing officer to decide all issues which had been determined by the contracting officer. Dean Penegar conducted a hearing on Massman's appeal on the issue of liability on August 4, 1980, and entered a decision on liability on March 3, 1981. A hearing was held on damages before Dean Penegar on August 26, 1981, and Dean Penegar issued a damage decision on August 12, 1982, although this decision did not set an exact damage amount. This suit was instituted by the plaintiff on March 17, 1983. On May 27, 1983, Dean Penegar issued a "supplemental opinion" setting damages.

DISCUSSION

The plaintiff contends that it was entitled to proceed with its dispute against TVA under the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613 (1982), but that it was not given the opportunity to do so because upon inquiry to Herbert Sanger, TVA's General Counsel, it was misinformed of its rights to proceed under the Act. Plaintiff argues that since it did not knowingly waive its rights to proceed under the Act, it has the option at this time to appeal the contracting officer's decision to this court for determination on the merits. The Court disagrees.

Plaintiff's rights to proceed under the Contract Disputes Act are regulated by the provisions of 18 C.F.R. § 1308.4 (1983). This section requires that in all claims involving pre-Act contract disputes initiated after March 1, 1979, a written notice of election to proceed under the Act must be included in the document first requesting a decision by the contracting officer. Plaintiff failed to

include such a notice of election in its letter of June 20, 1979, wherein plaintiff first submitted its claim to TVA. Thereby plaintiff waived its rights to proceed against TVA under the Act and is bound by the administrative appellate remedies provided in the Contracts Disputes clause. *See Brown & Root Development, Inc. v. TVA,* 681 F.2d 1313 (11th Cir., 1982).

Plaintiff argues in the alternative that even if this case is not governed by the provisions of the Contract Disputes Act, that plaintiff is entitled to *de novo* review of its claim against TVA because the decision rendered by Dean Penegar is void. Plaintiff contends that the decision rendered by Dean Penegar is arbitrary, capricious and not supported by substantial evidence in the record; that it contains numerous errors of law; and that it is tainted due to several *ex parte* communications between Dean Penegar and TVA's General Counsel prior to the issuance of Penegar's final decision on May 27, 1983.

Having thoroughly reviewed the record before us, the Court is of the opinion that plaintiff's allegations are totally without merit. Dean Penegar's decisions of March 3, 1981, and August 12, 1982, are legally sound and well supported. Inasmuch as his final decision of May 27, 1983, is entirely consistent with the rule set out in his earlier decision of August 12, 1982, the Court finds no reason to question the reasonableness of this final decision merely because it adopts *in toto* the damages calculations submitted by TVA. *See Edward Valves, Inc. v. Cameron Iron Works, Inc.*, 289 F.2d 355, 356 (5th Cir.), *cert. denied*, 368 U.S. 833 (1961), and cases cited therein. Furthermore, while defendant's decision to communicate with Dean Penegar *ex parte* concerning certain procedural matters was ill-advised, its conduct is not so improper as to taint the administrative appeals proceeding and to provide a

basis for the relief plaintiff seeks under 28 U.S.C. §§ 144, 455 (1976); Supp. V (1981). *See, Virgin Islands v. Gereau,* 502 F.2d 914, 932 (3rd Cir., 1974), *cert. denied,* 420 U.S. 909 (1975); *Bradley v. Milliken,* 426 F.Supp. 929, 941 (E.D. Mich., 1977), *aff'd,* 620 F.2d 1143, 1156-58 (6th Cir.), *cert. denied,* 449 U.S. 870 (1980); *United States, ex rel. Paris v. Brierley,* 315 F.Supp. 1392, 1397 (W.D. Pa., 1970); *In re Parr,* 13 Bankr. 1010, 1019 (Bankr. E.D. N.Y., 1981).

The Court therefore rules that the defendant, TVA, is entitled to judgment as a matter of law and that the decision of the appointed hearing officer, Dean Penegar, should be regarded as final.

An appropriate Order will enter.

/s/ Ted Milburn
United States District Judge

(Filed March 27, 1984)

IN THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

CIV-1-83-118

MASSMAN CONSTRUCTION CO.,
Plaintiff,

vs.

TENNESSEE VALLEY AUTHORITY,
Defendant.

MEMORANDUM

This action, involving a public construction contract, was filed by plaintiff, Massman Construction Company, after the hearing officer appointed pursuant to the contract's "Dispute Clause," rendered a decision the plaintiff considered unfavorable. Upon the defendant's motion for summary judgment, this Court affirmed the hearing examiner, and rendered a decision unfavorable to plaintiff. This action is presently before this Court on plaintiff's motion to reconsider.

In its own words, Massman contends:

(1) Under the applicable law, a proper and complete review of Dean Penegar's [the hearing examiner] decisions must be conducted by this Court under the Wunderlich Act. The guidelines and standards of the Wunderlich Act required this Court to review the entire

administrative record (including transcripts and exhibits) of both hearings and all briefs submitted to Dean Penegar by the parties. This Court had no basis to support its finding that Dean Penegar's administrative decisions were neither arbitrary nor capricious and were supported by substantial evidence since this Court did not have the administrative record before it and thus did not and could not comply with the mandate of the Wunderlich Act on conducting a full and complete review of this matter;

(2) The applicable regulations of TVA pertaining to disputes such as this which are covered by the Contract Disputes Act required the contracting officer in his decision to advise Massman of its right to appeal under the Contract Disputes Act. A complete review of the record that was before Dean Penegar clearly shows without any doubt that Massman had a *"dispute pending"* with TVA on the effective date of the Contract Disputes Act and that by its own regulations TVA was required and bound to promptly and correctly advise Massman in the contracting officer's decision of its appeal rights under the Contract Disputes Act and that it had thirty days from receipt of the Contracting Officer's decision to elect to process its appeal under the Contract Disputes Act. The Contracting Officer's failure to notify Massman of its appeal rights renders the Contracting Officer's decision void and of no effect;

(3) On receipt of the Contracting Officer's decision, Massman promptly requested TVA to advise it of its appeal rights. The General Counsel of TVA failed to inform Massman of its appeal rights in a timely manner and instead transmitted to Massman prejudicially erroneous information with regard to Massman's appeal rights. The General Counsel and his Office at this stage and

throughout the entire appeal process orchestrated procedures to deny due process to Massman. This conduct renders the decisions by Dean Penegar invalid and, under the controlling case law, entitles Massman to *de novo* review in this Court of its claims against TVA; and

(4) The Court further erred in granting summary judgment to TVA since there are material facts in dispute as to the procedural and operational deficiencies of TVA's appeal procedures. Those issues of material fact preclude summary judgment from being entered and Massman is entitled to a hearing on the merits of its claim that TVA denied Massman the procedural fairness that is the basic right of every government contractor.

The first contention concerns the standard of review this Court should apply on review. The Contracts Dispute clause governs this dispute and can be profitably compared to the Wunderlich Act, 41 U.S.C. § 321. The Contracts Dispute Clause states in pertinent part and with emphasis:

> *Any dispute* arising out of or connected in any way with any obligation of the parties arising out of the performance or nonperformance of the contract whether arising before or after completion of performance, including disputes as to any alleged violation or breach thereof, which is not settled or disposed of by agreement of the parties shall be decided by the Contracting Officer on the basis of the contract file and any other facts which he may deem pertinent. The Contracting Officer shall reduce his decision to writing and promptly mail or otherwise furnish a copy thereof to the Contractor. Within thirty (30) calendar days from the receipt of such copy, the Contractor may appeal by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to the

TVA's General Manager. After the filing of such an appeal the General Manager or a representative or representatives designated by him shall conduct a hearing at which both TVA and the Contractor shall be afforded an opportunity to be heard and to offer evidence relating to the dispute. . . . *The General Manager or his representative or representatives shall arrive at a decision upon the basis of the evidence presented at the hearing.*

The decision of the General Manager or his representative or representatives shall be final and conclusive upon the parties except on questions of law or unless *determined by a court of competent jurisdiction to have been fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence* (complaint ¶ 6).

In comparison the Wunderlich Act has the same standard of review and states with emphasis:

§ 321. *Limitation on pleading contract-provisions relating to finality; standards of review*

No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: Provided, however, *That any such decision shall be final and conclusive unless the same is fraudulent or capricious*

or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence. May 11, 1954, c. 199, § 1, 68 Stat. 81.

Because of the similarity of the Contracts Dispute Clause and the Wunderlich Act, cases decided under the Wunderlich Act are pertinent in deciding what this Court should do in reviewing the matter before it. The case of *Wm. A. Smith Contracting Company v. United States,* 412 F.2d 1325 (Ct. Cl. 1969), gives this Court the clearest direction in the following words:

> In reviewing a decision rendered by a Board of Appeals in a contract case, the review standard with respect to findings of fact made by the Board is that prescribed in the Wunderlich Act, 41 U.S.C. § 321. Under the provisions of that statute, the decision of the Board shall be final and conclusive unless it is fraudulent, or capricious, or arbitrary, or so grossly erroneous as to imply bad faith, or is not supported by substantial evidence. In determining whether a particular fact finding is supported by substantial evidence, this Court has said: "A scintilla is not sufficient, nor is it enough that some pieces of testimony, in isolation and by themselves, could be said to underpin the finding." Farnsworth & Chambers Co. v. United States, 346 F.2d 577, 582, 171 Ct.Cl. 30, 38 (1965). The existence of some evidence in the administrative record to support the decision is insufficient, and it is necessary to consider *the record as a whole to determine whether the decision is supported by substantial evidence.* Hoffman v. United States, 340 F.2d 645, 652, 166 Ct.Cl. 39, 51 (1964); Williams v. United States, 127 F.Supp. 617, 619, 130 Ct.Cl. 435, 441 *cert. denied* 349 U.S. 938, 75 S.Ct. 783, 99 L.Ed.

1266 (1955). Thus, in order to decide the questions of substantial evidence, the evidence presented by both parties, including testimony elicited by cross-examination as well as direct examination, must be considered. Hoffman v. United States, *supra*. *In a recent decision, this Court defined substantial evidence as that evidence which could convince an unprejudiced mind of the truth of the facts to which the evidence is directed.* Koppers Co. v. United States, 405 F.2d 554, 558, 186 Ct.Cl. 142, 149 (1968).

Therefore, this Court must, before attempting to address the contentions of plaintiff, read the entire record as a whole and decide whether there is evidence that could convince an unprejudiced mind of the truth of the facts to which the evidence is directed, the hearing officer's opinion's veracity and support.

In addressing contention (1) it must be remembered that two opinions of Dean Penegar's are present on the record which has been read. These two opinions are titled a "decision" and a "supplemental opinion." The supplemental opinion was treated by Dean Penegar as a motion for reconsideration and opened the original opinion up on three principal items only, namely, *equipment*, *supervisory wages*, and *home office expenses*. Apparently, Dean Penegar was concerned enough with evidence in the original record to reconsider these items. Unfortunately, as Dean Penegar states, "Instead of filing additional affidavits, documents or records, or explaining where in the existing record in this hearing process the missing details could be found, . . . the Contractor has chosen instead to submit additional authorities and arguments in support of its earlier legal theory of the case."

This Court agrees with Dean Penegar's decision and finds it supported by the only and therefore substantial evidence. To allow a *de novo* hearing in this Court at this point in the dispute would permit plaintiff to circumvent the administrative procedure. A plaintiff could simply refuse to put on its complete proof before the hearing examiner and then demand a trial *de novo*. Therefore, the Court will deny plaintiff's motion to reconsider.

Massman's contentions (2) and (3), which are stated above, have been addressed substantially by our previous Memorandum in this case and are not necessary to address further. Contention (4) is incorrect since no dispute of material fact on the evidence was demonstrated.

This Court, therefore, finds that Dean Penegar's decision and supplemental opinion are supported by substantial evidence and denies plaintiff's motion to reconsider.

An appropriate order will enter.

/s/ Ted Milburn
United States District Judge

CONTRACT DISPUTE PROCEEDING

Contract No.
75K35-75800

(Damages)

In the Matter of

Massman Construction
Company

FINAL ORDER

In accordance with the findings of fact and conclusions of law in the Hearing Officer's decisions of March 3, 1981, August 12, 1982 and the further memorandum opinion of May 27, 1983, and the attached damages computations based on the evidence of record, it is

ORDERED THAT MASSMAN CONSTRUCTION COMPANY IS ENTITLED TO RECOVER $378,742 FROM TVA IN FULL AND FINAL SATISFACTION OF ITS CLAIMS IN THIS DISPUTE; THAT TVA IS ENTITLED TO A CREDIT OF $420,667 FOR SUMS PREVIOUSLY PAID AGAINST THAT CLAIM; AND THAT TVA IS THEREFORE ENTITLED TO RECOVER THE SUM OF $41,925 FROM MASSMAN CONSTRUCTION COMPANY.

This 27th day of May, 1983

/s/ K. L. Penegar
Kenneth L. Penegar
Appeal Hearing Officer

DAMAGES COMPUTATIONS

Equipment[1]		
Claimed	$971,661	
Allowed	119,065	
Paid	245,457	
Due		($126,392)
Materials and Services[2]		
Claimed	$ 61,945	
Allowed	27,098	
Paid	2,645	
Due		$ 24,453
Hauling Costs[3]		
Claimed	$ 5,307	
Allowed	5,307	
Paid	–0–	
Due		$ 5,307
Cell Fill[4]		
Claimed	$ 7,578	
Allowed	7,578	
Paid	–0–	
Due		$ 7,578
Direct Labor[5]		
Claimed	$131,966	
Allowed	111,691	
Paid	101,552	
Due		$ 10,139
Indirect Labor[6]		
Claimed	$ 61,176	
Allowed	45,571	
Paid	16,054	
Due		$ 29,517

Supervisory Wages[7]		
Claimed	$ 64,097	
Allowed	9,303	
Paid	21,611	
Due		($ 12,308)
Labor Fringe Benefits[8]		
Claimed	$ 13,172	
Allowed	10,725	
Paid	1,818	
Due		$ 8,907
FICA[9]		
Direct Labor		
Claimed	$ 5,937	
Allowed	5,046	
Paid	505	
Due		$ 4,541
Indirect Labor		
Claimed	$ 3,579	
Allowed	2,666	
Paid	764	
Due		$ 1,902
Supervisory		
Claimed	$ 3,542	
Allowed	514	
Paid	806	
Due		($ 292)
FUTA[10]		
Direct Labor		
Claimed	$ 599	
Allowed	509	
Paid	459	
Due		$ 50

Indirect Labor		
Claimed	$ 1,054	
Allowed	785	
Paid	–0–	
Due		$ 785
Supervisory		
Claimed	$ 518	
Allowed	75	
Paid	175	
Due		($ 100)
W/C and General Liability Insurance[11]		
Claimed	$ 33,997	
Allowed	28,882	
Paid	8,368	
Due		$ 20,514
Umbrella Insurance[12]		
Claimed	$ 1,339	
Allowed	1,339	
Paid	–0–	
Due		$ 1,339
Bond Premium[13]		
Claimed	$ 10,417	
Allowed	2,588	
Paid	–0–	
Due		$ 2,588
Home Office Expense[14]		
Claimed	$ 83,946	
Allowed	–0–	
Paid	20,453	
Due		($ 20,453)

Profit[15]

Claimed	$148,304	
Allowed	–0–	
Paid	–0–	
Due		–0–

Interest[16]

Claimed	$ 553,524	
Allowed	–0–	
Paid	–0–	
Due		–0–

Totals[17]

Claimed	$2,163,664	
Allowed	378,742	
Paid	420,667	
Due		(41,925)

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1. *Equipment.* Massman is entitled to increased equipment costs in the amount of $119,065 computed as follows (damages decision at 5; exh. 79, subexh. 11):

	1850 LIMA	Full Use Drill Barge	Scow 117	Reed Barge	
Monthly rental rate	$30,000	$25,000	$ 5,000	$2,500	
Times 3 months	x3	x3	x3	x3	
Three month rental	90,000	75,000	15,000	7,500	
+ Sales Tax at 3.5%	3,150	2,625	525	263	
	93,150	77,625	15,525	7,763	
+ Local Tax Option at $7.50/unit/month	23	23	23	23	
	93,173	77,648	15,548	7,786	
– Monthly owned rate x3	29,580	28,410	12,300	4,800	
Equipment costs allowed	63,593	49,238	3,248	2,986	= 119,065

2. *Materials and Services.* Massman is entitled to increased materials and service costs in the total amount of $27,098. This amount is the $2,645 previously paid by TVA and considered undisputed by the Hearing Officer, plus the $24,453 additional allowed in the damages decision (at 8). See exh. 79, subexh. 8.

3. *Hauling Costs.* Massman is entitled to increased hauling costs in the amount of $5,307 (damages decision at 8).

4. *Cell Fill.* Massman is entitled to cell fill material escalation in the amount of $7,578 (damages decision at 8-9; exh. 79, subexh. 10).

5. *Direct Labor.* Massman claimed direct field labor cost increases of $131,966 based on 247 delay days. This 247 days consisted of 63 days claimed during the winter of 1977-78 (tr. 110) which were not allowed (damages decision at 4). Thus, Massman is entitled to compensation for no more than 184 delay days (*i.e.*, through November 9, 1977). November 9, 1977 represents the original contract completion date of March 18, 1977, plus 52 days for additional work added by changes of contract and not in dispute in this appeal, plus 184 delay days. Massman claimed direct field labor increases through November 9, 1977 totaling $111,691 ($23,263 + $77,693 + (42/92)($23,514 = $111,691) (exh. 79, subexh. 1A). This is 85 percent of the amount claimed for direct field labor cost increases.

6. *Indirect Labor.* Massman is entitled to 184 days of increased indirect labor costs at the claimed rate of $247.67 per day (exh. 79, subexh. 1B) for a total of $45,571. This is 74.5 percent of the amount claimed for indirect labor cost increases.

7. *Supervisory Wages.* Massman is entitled to increased supervisory wage costs in the amount of $9,303 (damages decision at 9). This is 14.5 percent of the amount claimed for increased supervisory wage costs.

8. *Labor Fringe Benefits.* Massman is entitled to increased labor fringe benefits in the amount of $10,725. This is an allowance of $.0682 per dollar of the allowed direct and indirect labor cost increases (*i.e.*, the rate claimed in exh. 79, subexh. 6).

9. *FICA.* Massman is entitled to increased FICA costs in the same proportions that increased labor costs were allowed (*i.e.*, 85 percent of direct labor FICA claimed; 74.5 percent of indirect labor FICA claimed; and 14.5 percent of the supervisory FICA claimed) (exh. 79, subexh. 3).

10. *FUTA.* Massman is entitled to increased FUTA costs in the same proportions that increased labor costs were allowed (85 percent of direct labor FUTA claimed; 74.5 percent of indirect labor FUTA claimed; and 14.5 percent of supervisory FUTA claimed) (exh. 79, subexh. 4).

11. *W/C and General Liability Insurance.* Massman is entitled to increased workers' compensation and general liability insurance costs in the amount of 17.34 percent of the increased direct labor, indirect labor, and supervisory labor costs allowed (*i.e.*, the rate claimed in exh 79, subexh. 5).

12. *Umbrella Insurance.* Massman is entitled to increased umbrella insurance costs in the amount of $1,339 (damages decision at 11; exh. 79, subexh. 7).

13. *Bond Premium.* Massman is entitled to increased bond premium costs in the amount of .6345 percent of the total claims allowed (*i.e.*, the rate claimed in exh. 79) plus .6345 percent of the $31,623 previously allowed by TVA for out-of-sequence cell labor (*i.e.*, plus $201).

14. *Home Office Expense.* Massman is not entitled to any increased home office expense (damages decision at 12-15).

15. *Profit.* Massman is not entitled to any increased profit (damages decision at 15-17).

16. *Interest.* Massman is not entitled to any interest (damages decision at 17).

17. *Totals.* The total amount claimed by Massman is $2,163,742 (the total principal claim of $1,610,140, plus the interest claim of $553,524). The total amount allowed is $378,742. TVA has paid a total of $420,667 against the amounts claimed (exh. 79) and thus is entitled to a remittance from Massman of $41,925.

CONTRACT DISPUTE PROCEEDING

Contract No.
75K35-75800

(Damages)

In the Matter of

Massman Construction
Company

SUPPLEMENTAL OPINION

In the time since the entry of the decision on damages (August 12, 1982) the Contractor has initiated various communications with TVA and with the Appeals Hearing Officer, most notably letters containing submission of additional authorities in September and October and a reply letter in November, plus most significantly, a conference telephone call among counsel for the Contractor, counsel for TVA and the Appeals Hearing Officer on October 21, 1982. The thrust of the communications from the Contractor is one of basic disagreement with TVA over the specific content and magnitude of the final award which the Hearing Officer had asked the parties to prepare in the light of his August 12, 1982 damages decision.

To narrow the scope of the Contractor's submissions, it was agreed during the aforementioned conference telephone call in October that the Contractor would submit a letter or memorandum setting forth with particularity the Contractor's claims as to possible errors in law and/or in fact in the damages decision as to three principal items only, namely, *equipment*, *supervisory wages*, and *home office expenses*. It is clear from a letter dated Novem-

ber 19, 1982 from counsel for the Contractor what he had agreed to do:

> It was our understanding, based on our telephonic conversation, that you requested our office to furnish to you on behalf of Massman *any information* which we believed would be of assistance in issuing your final order reconciling the difference between the amount which TVA has asserted should be in the order of the amount which Massman claims as proper under the terms of your two prior decisions. (emphasis added)

At issue, with regard to these three principal damage items, was the question whether the Contractor had proven actual losses with regard to, one, the Massman owned equipment which was on site and unused during the three-month interruption with any greater specificity than offered in Exhibit 79; two, supervisory wages, i.e., which particular personnel on what particular assignments and for what specific times; and, three, home office expenses —namely, whether there was any factual foundation for applying a six percent formula to personnel in the home office said to be working on this project during the delay times for which TVA was responsible.

Instead of filing additional affidavits, documents or records, or explaining where in the existing record in this hearing process the missing details could be found, or in the alternative moving for an additional factual hearing or for comparable relief, the Contractor has chosen instead to submit additional authorities and arguments in support of its earlier legal theory of the case. The further submissions made by the Contractor have been treated collectively and in substance as a motion for reconsideration of the damages decision by this Appeal Hearing Officer.

The additional authorities presented have been reviewed and have been found unpersuasive, inapplicable, or indeed contrary to Massman's position. And while the Contractor has previously stressed and emphasizes here again in these post-decision submissions the alleged failure of TVA to call its own auditors with regard to various factual points of dispute, Counsel for Massman simply misconceives the nature of its responsibility and opportunity in this regard. Again, the authorities are clear that the government agency declines to call its own auditors at its own peril only in situations where an equitable adjustment is the focus of the proceeding. E.g., *Excavation-Construction Inc.*, opinion of Judge Sheridan on motion for reconsideration, September 14, 1982. "Equitable adjustments . . . are simply corrective measures utilized to keep a contractor whole when the government modifies a contract." *Bruce Construction Corp. v. United States*, 324 F.2d 516, 518 (Ct. Cl., 1963). In such cases the contractor's *reasonable* costs are what is sought by the tribunal, and its *actual* costs may suffice in the absence of a showing by the government that these are *unreaonable*. Id. at 520; see also *Cal Construction*, 78-1 BCA, ¶12,992. Even were this an equitable adjustment case, the contractor could not prevail. Massman has not adequately demonstrated what its *actual* home office costs were, its actual costs on certain owned equipment, nor its actual supervising field labor costs.

Here we have a contract breach situation, and the law is clear that the complainant bears some burden of bringing forward sufficient factual information to form a basis for an award of damages, i.e., a showing of genuine loss from the admitted breach. This is not a situation, in other words, where the best evidence of what occurred lies naturally within the bureaucracy of the agency. Cf. *Amer-*

ican Standard, Inc., DOT CAB 71-1, 72-1 BCA ¶9433. On the contrary, all of the facts which would make out Massman's claim to a substantial loss lay exclusively in the records and memories of the personnel of Massman Construction Company. It was not TVA's responsibility to dig the information out, assemble it and produce it for this hearing. That Massman failed to undertake this appropriate research and submit it to the Hearing Officer cannot be attributed to any default on the part of TVA. That is not to say that TVA should be denied its opportunity for discovery which it exercised in this case. But the fact remains that the Contractor complaining of a breach and substantial losses flowing from the breach had the obligation and the opportunity to bring forward the necessary information to sustain its claim. Accounting formulae and other rules of thumb often may assist in assessing or measuring such claims, but they cannot substitute for a need to have the underlying loss shown to have substantial form.

In light of the above the case returns to its earlier posture. The Contractor has chosen to argue the legal issues again, and these arguments and authorities have been reviewed. Additionally, the factual submissions, transcripts, records and exhibits have also been reviewed again in the light of this request by the Contractor for reconsidration. No grounds have emerged in this review process for setting aside or modifying the earlier damages decision. Accordingly, the attached order is being entered to bring these proceedings to a close.

/s/ K. L. Penegar
Kenneth L. Penegar
Appeal Hearing Officer

May 27, 1983

CONTRACT DISPUTE PROCEEDING

Contract No.
75K35-75800

(Damages)

In the Matter of

Massman Construction Company

DECISION

The decision of March 3, 1981, in this matter described that (a) the delay in starting work was TVA's responsibility—so far as the Contractor's escalation in costs because of that delay is concerned; and (b) that the interruption of dredging and spoiling for three months in 1977 was also chargeable to TVA—again so far as compensating Massman for increased costs to perform the Contract as bid is concerned; and (c) that if working through a second or unexpected extra winter also caused Massman costs additional to those contemplated by its bid, then these too were to be charged to TVA.

It was also noted in the decision of March 3, 1981, that claims for additional labor costs were dealt with under the terms of the Contract.

The Contractor's proof of damages with a few notable exceptions has taken the form of adding up its overrun days for completing the project and applying various formulae for extending the money cost for a series of discrete items such as wages, various federal taxes, fringe benefits and insurance coverage, materials, and the like.

The difficulty of this approach is that it assumes a theory of injury to the Contractor which admits of only one factual foundation. If that foundation is not made out by the Contractor's proof, and some other theory of damages is not apparent in the proof that is presented, then these categories are left in a void. That foundation here was Massman's view that because of the initial delay, coupled with the subsequent spring interruption of work, together with a number of bad winter days (in the second winter), TVA was obligated to pay for an *extension* of all these various categories of costs for these aggregate overrun days.

The law of contract damages is not quite that simple. While the law's objective is to put the injured party in as good a position as it would have been in in the absence of the breach, principles of damages law insist that the defendant's breach not be the occasion for putting the plaintiff in a *better* position. This means that in order to award damages a tribunal must be able to find that the breach was the cause of the injury or loss complained of. As one court has put it, "to be recoverable damages must be the direct result of the breach." *Gardner Displays v. the United States*, 171 Ct. of Claims 497, 346 F.2d 585 (1965). In this case it appears that the prolongation of the Contractor's work was the product of several factors, not merely TVA's delay and interruption—important as they are as the foundation for the relief to which Massman does appear entitled. Chief among these other contributing causes for at least some of the overrun in time was the nature of the rock to be excavated at the core of the project. It was assumed by the Massman Company that the nature of the rock to be excavated would be completely solid, whereas in point of fact as the daily construction logs of Massman's company illustrate, the rock

was fissured and contained mud seams—all of which contributed to the much vexed drilling problem. Exhibits 81 and 88; TR. 181-186. And there were equipment breakdowns on the digging which accompanied the drilling. TR. 184-191.

Accordingly, I find that the days-of-total-delay approach generally unacceptable in approaching the assessment of damages in this case. This does not mean, however, an end to the inquiry as to Massman's damages on some other theory, implicit in the facts and circumstances of this case as presented. As this Hearing Officer has already held, TVA is responsible for the breaches of the Contract as previously determined, for "in order to establish liability the plaintiff must [only] show that the defendant's breach was a substantial factor in causing the injury." 5 Corbin On Contract, § 999. The problem before us now is to assign in a reasonable manner the damages proximately flowing from the breaches for which TVA is liable.

A separate finding relates broadly to Massman's general approach to its damages in this case and will be more specifically relevant to a number of individual items dealt with subsequently. This is the matter of the second winter which was in part a consequence of the two breaches attributed to TVA, namely the delay and the three months interruption. On the record as it has unfolded in this phase of the case, it is apparent that whatever the severity of the winter may have been, Massman has been unable to demonstrate that its productivity was adversely affected in substantial magnitude by that factor. Indeed, although there is evidence of record suggesting some difficulty with the weather (TR. 174-177), the greater weight of this evidence leads to the conclusion that the weather during the

winter of 1977-78 was not severe, except for perhaps one week, enough to cause a substantial reduction in drilling and digging operations of this kind. Exhibits 81, 89 & 91; TR. 191, 204.

The following sections deal with the major categories of claim presented in this appeal by the Massman Construction Company, beginning with equipment costs.

I. *Equipment costs.*

a. *Major equipment.* There has been no clear and specific showing of loss arising out of the original delay by TVA. The owned equipment of Massman was released to other Massman jobs early enough apparently to obviate any idling loss it may have incurred during this period of time. And with respect to the claim for rental payments, Massman's own witness has shown that there was an equivalent gain to Massman in the use of its cheaper equipment on the other jobs—presumably during any and all of the times in question in this dispute. TR. 123-24.

With respect, however, to the interruption, there was a demonstrable loss. Massman had, in addition to equipment on its hands which it was renting in place of its own released equipment, other equipment which it had contemplated all along renting for this project but not for such an extended period of time. With respect to this non-owned major equipment the Contractor—because of the interruption—had a three month expansion of its rental use not contemplated in the original bid. And it is deemed unreasonable to expect the Contractor to release these expensive and ponderous pieces of equipment only to have to arrange for their return in three months time. For some of this equipment, a large crane for instance, it is necessary to dissassemble it in order to make it mobile.

The fair result is to allow Massman the difference between the monthly rental of the four pieces of equipment in question (Nos. 1850 Lima Crane Barge, full-use drill barge, scow no. 117, and one Reed Barge) for three months on the one hand and the projected owner charges for the equivalent equipment for those three months, on the other, plus state and local taxes. These are contained in Exhibit 79, subexhibit 11.

b. *Other equipment.* Here the distinction of rental and owned equipment does not apply. While it is likely that Massman could and did use much of its other equipment such as trucks, tools and welding machines on other profitable jobs, it is also possible that the Contractor kept some of it on standby awaiting the permission to start. In the form in which the Contractor has presented this portion of its claim, however, it is impossible to tell how this equipment was affected by the initial delay. See Exhibit 79, subexhibits 11 & 12; TR. 50-60.

Some of this minor equipment might have been idled, too, during the three months suspension of work, although some of it could well have been used on the other (dry) work that went on during that period. In any event, the summary form of Massman's proof simply makes it impossible to make such distinctions. TR. 50-60; Exhibit 79, subexhibit 12.

It would appear that the Contractor is in the case of most of this category of equipment, charging most or all of its alleged 247 days-overrun to TVA. For instance, many of the items listed are for 8.17 months of delay (two tool trailers, four welding machines, several barges, steel pontoons, and one Ford sedan, etc.) Exhibit 79, subexhibit 12. Given the basic findings above relating to the variety of causes of the "stretch-out" of Massman's work and the

very limited scope of TVA's breaches, the initial delay and a three-month interruption, such claims are in their nature not credible. The Contractor might well have suffered some loss with respect to this owned equipment, but it has simply not borne its burden of proof in that regard. There are other items in the list, a pile hammer and clam bucket, for instance, for which shorter delay periods are claimed, but there is no explanation for these variations; and the total effect is one of very crude estimates for the whole list, except for the major items about which there was testimony as to how they were handled and why.

Even if Massman's proof on its losses through equipment being idled by one or another of TVA's breaches were more substantial or better tailored, it would have encountered yet another obstacle not anticipated in its proof or arguments. That is the need to discount any damages for lost use of productive equipment by some appropriate factor for the salutary absence of wear and tear normally associated with such usage. See *W.G. Cornell Co. v. Ceramic Coating Co.*, 626 F.2d 990 (D.C. Cir. 1980); *L.L. Hall Construction Co. v. United States*, ... F.2d 559 (Ct. Cl. 1966).

II. *Escalation of materials and services.*

a. *Materials and services—escalated.* Massman had employed a formula to estimate its increase in costs of materials and services, part of which is a time reference of 823 days to reflect basic changes in index costs from October 1, 1975, to January 1, 1978. This space of time begins at the time it should have begun the project until the end, or very nearly, the end of the actual work. Exhibit 79, subexhibit 8. This is incorrect. The initial delay caused by TVA was only 10 months in length for 300

days. Therefore, Massman's claim of $59,300, under this heading, should be reduced by a factor of 3/8 yielding $22,230.

But Massman also conducted a part of its dredging and dumping operations after the 90 day interruption subsequent to the initial 300 day delay. Accordingly, it is entitled to some escalation of materials costs for this portion of the job as well. I find that a factor of 15 percent, or $3,345 additional, will satisfy this element of loss which is necessarily an estimate.[1] (A total of $24,453 under this heading.) Measuring of damages is not an exact science but is a judgment based upon facts and circumstances as well as general principles of law. See *Kings Electronics Co. v. United States*, 169 Ct. Cl. 433, 341 F.2d 632 (1965).

b. *Hauling costs increase.* This is a simple, one-time increase in the per hour hauling costs which went up after the Contract was entered into and after the delays of TVA. TR. 41, Exhibit 79, subexhibit 9. The stated amount claimed is $5,307 and is found to be reasonable.

c. *Cell fill material escalation.* Similar to the previous category, this is an instance of an increase in the costs of special material used to fill up the sheet cell piles used in the offshore baffle system constructed as a part of Massman's Contract. The material cost $2.50 per ton at the

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1. This estimate is based on a study of Exhibits 81 and 93 (namely, Massman's daily construction logs and the visual summary prepared by TVA to reflect the detail from those reports), from which it appears there were 92 days of actual excavation in this post-interruption period. Of these there were only 11 days in which production was as high as 500 cubic yards or greater. Fifty days produced 250 cubic yards each or less, and the remaining 26 days produced an average even lower than that. Consequently, the use of a daily average of 300 cubic yards each for these 92 days seems eminently fair. Fifteen percent of the anticipated total excavation of 210,000 cubic yards is 31,500, which in turn is very close to the estimated 27,600 produced through this computation based on the above Exhibits.

time of the bid, 1975-76, and went up to $2.75 later when the work was performed. TR. 43-44; Exhibit 79, subexhibit 10. The evidence of this loss is uncontroverted and seems reasonable.

III. *Labor Costs.*

a. *Direct and indirect field labor increases.* The Contractor's claim of $75,536 under this heading is presumably entered here for the sake of completeness. Such claims are clearly covered under an explicit provision of the Contract, namely "Field Labor Costs Adjustment for TVA Wage Classifications" (TVA No. 9601 (DP-8-74)). Thus, it is expected that TVA will make an adjustment in Contract price under this provision, with the final payment under the Contract. In determining such amount the parties no doubt will be guided by the findings and conclusions of this decision.

b. *Supervisory wages.* This portion of the Contractor's claim by its nature does not fall within the "field labor adjustment" provision, above, and hence is properly here as a claim under other increased costs as damages flowing from the TVA breaches. There are two entries under the subheading—one for the home office payroll and one for field salaries. The latter are clearly presented, namely the increase for Gene Hull and John Farr amounting to $9,303. This is a reasonable sum and supported by the record. See Exhibit 79, subexhibit 2. On the other hand, the larger figure of $54,794 claimed for home office payroll is far from clearly and convincingly presented in that the only entry thereunder shows a total cost for this item for the whole project of $138,756 from which is subtracted two sums (one, $83,337 for "10 months at 1975 rates," another of $625 for "one month numbers

7/1/76 rate increase") totaling $83,962. Exhibit 79, subexhibit 2. It is not at all clear how this process reflects the initial delay and interruption only and not other additional influences contributing to the total costs in the home office supervisory salaries during the periods in question. Moreover, it is not a reasonable result, attributing so large a portion of these costs (nearly 40 percent of the total) to the increases occasioned merely by the passage of the time involved in the initial delay of startup and the later three month interruption.

IV. *Other "Overhead"* (taxes, insurance, bond premium, fringe benefits on labor, and home office expense)

Fringe benefits. Massman claims that $11,354 remains unpaid. The claim is clearly tied to the field labor escalation costs, above, and will presumably be included in the TVA's final payment to the Contractor. There appears to be no controversy in this record about the matter.

FICA and FUTA taxes. The Contractor claims an outstanding balance for these two federal employee taxes of $10,983 (FICA) and $1,537 (FUTA). Again, these are tied to increased labor costs and will presumably be covered in TVA's final settlement. There appears to be no controversy over these items.

Workmen's compensation and general liability insurance. This claim of $25,629 for increased liability insurance premiums is soundly presented except in one respect. So far as the computation depends upon an additional supervisory payroll cost of $64,097 (see above), the result will have to be adjusted to reflect the disallowance of that portion of the base. See Exhibit 79, subexhibit 7.

Umbrella insurance. This element is clearly established and reasonable in amount. Exhibit 79, Subexhibit 7.

Bond premium. This Contract was subject to both a performance bond and a payment bond each in the amount of $1,260,160—the face amount involved in the Contract. Of course the premium on these bonds is a necessary and proper part of the overall expenses of performance, the premium appears to be a function of the Contract amount. But we will not know the final amount until the settlement emerging from this hearing process takes place. The rate asserted by Massman is .6345 percent, and this is not challenged by TVA. Accordingly, the Contractor will be entitled to a sum produced by multiplying the above mentioned rate times the additional costs generated by the other categories of damages herein plus the extra labor costs to be awarded under the Contract provisions.

This conclusion is subject, however, to the condition that if as a legal matter the Contractor's obligations under the bond requirements of the Contract have ended and the Contractor has not in fact paid such additional premiums, then this aspect of the decision is void and of no effect. The parties, if they cannot agree on the point, may submit as part of the final plea for judgment their points and authorities in respect of the issue.

Home office expense. That home office overhead is a well recognized item of damages for government delay is acknowledged and well supported. See, e.g., *Luria Brothers & Co. v. United States*, 177 Ct. Cl. 676, 369 F.2d 701 (1967); *J.D. Hedin Construction Co. v. United States*, 171 Ct. Cl. 70, 347 F.2d 235 (1965). There are, however, at least two conditions which if not met courts are reluctant to assign an award for damages to such a claim. Both

are designed to reduce the sheer guesswork of the process as much as possible, for in the nature of things an award of general office expense is an estimate of a hidden cost and not a clear, separate payment as such.

One of these conditions insists that the Contractor show how the delay in a particular case prevented the Contractor from using the home office staff for other profitable work during the delay caused by the defendant. *Cornell Co. v. Ceramic Coating*, 622 F.2d 990 (D.C. Cir. 1980). This kind of showing, not made here, can best be illustrated by a case in which its need was absent. *Luria Brothers, supra*, relied on by Massman was such a case. There the delay in question was an overrun of work solely attributable to the government's faulty design. Here we have an initial delay of 10 months during which the Contractor presumably used its home office staff very little on the Raccoon Mountain project which had not yet begun. It is possible that during the later three-month suspension of work Massman's home office did experience unproductive association with this project which could be compensated by an award under this heading, but the Contractor has not presented any practical way for that segment to be segregated and estimated with any confidence.

This brings us to the second requirement of a successful claim for office overhead, that any rate or estimate attribtuable to the particular project be reasonable under all the circumstances. The method approved in the *Luria Brothers* decision is illustrative of one successful approach. There the total volume of the contractor's business for the period in question was determined, and home office overhead was allocated to the job in question based on its percent of that total volume. This produced a figure which was prorated over the precise limits of the overrun

caused by the government's faulty design. See 177 Ct. Cl. at 692-693. A different but only slightly larger figure was produced by a process which first removed from total overhead attributable to the project a sum said to represent a percent of the Contractor's expected overhead had the project not been delayed. This approach was disapproved by the court since it introduced "an additional estimate (the five percent figure) in determining the excess overhead." 177 Ct. Cl. at 693, Note 12.

It may well be that some percent or fraction of the other additional costs found here would properly reflect Massman's office overhead for the extras. The difficulty is that the Contractor has not given us a plausible handle on that possibility. Thus, the six percent figure is said to be:

> "an average of what was going on during these periods. It's . . . a result of audits that are performed. You know, we have people from . . . different supply people, from the Corps of Engineers. We have Ernest and Winnie." TR. 61 (Contractor's principal witness, Mr. Henry Massman).

Thus, the origins, reasonableness and reliability of that rate remain obscure and speculative.

The Hearing Officer is aware that in some cases a court seemingly divines a rate for this purpose, or uses its own best equitable impulses to make such a determination. E.g., *Bennett v. United States*, 371 F.2d 859 (Ct. Cl. 1967). The more defensible approach is seemingly one in which more precision is demanded. E.g., *J.D. Hedin Construction Co. v. United States*, 347 F.2d 235, 259 (Ct. Cl. 1965); *Luria Brothers v. United States*, 177 Ct. Cl. 676, 369 F.2d 701 (1966).

Counsel for Massman has through its posthearing brief suggested one possible foundation for the overhead rate of six percent. Thus:

> "The audited books of Massman disclosed that Massman, from 1978 to the date of the hearing, experienced an average home office expense at the rate of *six percent of the gross field expense*." TR. 63 [emphasis added].

Contractor's first posthearing brief of October 23, 1981. But the transcript reference does not quite bear out the point. It was counsel who in his question to the principal Massman witness said, "It has been demonstrated that your home office expense . . . against work . . . is a six percent figure?" And the answer given was "Yes." TR. 63, lines 13-19. There is, alas, no such demonstration in the record on how the six percent was derived, when, by whom, or with regard to what work. The rate, therefore, remains too elusive to form the basis for an award of legally compensable damages.

V. *Profit and interest.*

a. *Profit.* Generally the object in determining damages for breach of contract is to put the injured party in as good a position pecuniarily as he would have been in if the contract had been completely performed. *G.L. Christian & Associates v. United States*, 160 Ct. Cl. 1, 312 F.2d 418, Cert. Den. 375 U.S. 954 (1963). And typically where the case is one of performance—albeit under adverse circumstances of defendant's breach—the proper measure of damages for the breach is the amount of plaintiff's extra expenses directly attributable to the breaches. *J.D. Hedin Construction Co. v. United States, supra.* Sometimes the court is more emphatic, thus: "In a suit for

breach of contract plaintiff is not entitled to profit on the amount of his damages." *Torres v. United States*, 126 Ct. Cl. 76, 79; 112 F. Supp. 363, 365 (1953).

Like most general legal principles, this one, too, has its exceptions. Thus, where the contract is cancelled or completely frustrated—no payments have been made but no contractor's costs have been expended either—then the measure of plaintiff's damages may properly be the profit the contractor would have earned had the contract not been cancelled. *Anvil Minning Co. v. Humbell*, 153 U.S. 540 (1894); *Roehm v. Horst*, 178 U.S. 1 (1900). See also *Neely v. United States*, 182 Ct. Cl. 137, 285 F.2d 438 (1961).

And sometimes the general rule has been abandoned, where the claim in question was cognizable administratively as a "constructive change" or "equitable adjustment." In such an instance the court has allowed profit on the additional work of the aggrieved contractor since that could have been done administratively. *Bennett v. United States*, 371 F.2d 859 (Ct. Cl. 1967). See also *Fattore Co. v. Metropolitan Sewage Commission*, 505 F.2d 3 (7th Cir. 1974); and *General Builders Supply Co. v. United States*, 409 F.2d 246 (Ct. Cl. 1969).

The present case is indeed a classic claim for damages for breach—first of the implied duty promptly to let Contractor begin the work, and secondly, of the Contract term requiring TVA to use an alternate method of dumping (to avoid a shutdown of that work). There was no clause which allowed these matters to be adjusted administratively. Hence, this dispute—cognizable under the "all-disputes" type clause of this Contract under whose authority this proceeding is being held. Quite properly,

therefore, we have to apply the general rule and disallow any claim for profits on the damages here assessed.

b. *Interest.* The Massman Company claims interest on the damages it has suffered by TVA's breaches. TVA's denial of its liability for such an award presents a pure question of law. Massman has made several resourceful arguments in support of its claim, but it appears there is persuasive or conclusive authority against it on every point. The matter is too well settled to warrant extensive discussion here that absent a clear and unambiguous waiver by congressional enactment an agency of the United States is not liable for prejudgment interest. And there has been no such enactment for TVA. *Alcea Band of Tillamooks,* 341 U.S. 4 (1951); *Oman Construction Co. v. TVA,* 486 F. Supp. 375 (M.D. Tenn. 1979); and In re *Research Cottrell Inc.*, Contract No. 72C53-75199 (Decision by TVA Hearing Officer, K.D. McCasland, October 31, 1977.)

CONCLUSION AND ORDER.

Some of the categories of damages are now as definite and precise as they can be. Others await some further computation in light of this decision. There is thus a need for the parties to undertake this further computation and submit an agreed final order to this Hearing Officer for that purpose. It is directed that the agreed final order be submitted no later than 45 days from the date of this decision.

/s/ K. L. Penegar
Kenneth L. Penegar
Appeal Hearing Officer

August 12, 1982
Date

TENNESSEE VALLEY AUTHORITY

IN THE APPEAL OF MASSMAN
CONSTRUCTION COMPANY
CONTRACT NO. 75K35-75800
RACCOON MOUNTAIN PROJECT

DECISION

There are two basic claims here in dispute. One relates to the delay in the start-up time. And the other relates to the interruption of work of dredging and spoiling operations late in the actual operations once commenced. The actual extent of any such damage resulting from the events complained of has, by agreement of the parties, been left for subsequent hearing, should either or both issues in this proceeding be determined in the contractor's favor.

For the reasons which appear below and based on the findings made herein, it is the conclusion of this hearing officer that: (1) the contractor was entitled under the terms of the contract to a reasonably prompt notice to proceed sometime close to and not remote from October 1, 1975, and that TVA in failing to give such notice and not permitting the contemplated work to begin until some ten months later violated the rights of the contractor entitling the contractor to be compensated in damages not otherwise already paid; (2) that the three month interruption of dredging and spoiling work in the spring of 1977 caused the contractor additional expenses and these were attributable to TVA's failure to accord the contractor its rights under the contract.

I

The Delay in Commencement of Work

Contentions. The contractor appeals from the denial by the Contracting Officer (in his decision of November 20, 1979) of a claim for an adjustment to contract price to compensate the contractor for increased costs attributable to a delay of 14 months in the start of performance under this contract, namely an alleged delay from June 15, 1975, until August 18, 1976.

The contractor's claim for delay costs rests principally on two factual assumptions or allegations and is carried forward in the briefs and in oral argument through two legal arguments. First, the contractor contends that the start date was fixed in the contract as June 15, 1975, by the setting of 215 as the number of days required and by the establishment of the completion date as December 15, 1975. The actual commencement date was August 18, 1976. Second, the contractor impliedly asserts that TVA did not give its notice to proceed in a reasonably timely fashion, considering all the circumstances, among which were: the contractor's expectation that it would not have to work during the winter; that equipment, labor, services, and materials costs would necessarily be higher for the contractor—apart from winter work—if the contract was performed during a period remote from that originally contemplated. In this regard, the contractor places special emphasis on the fact that by the time notice to proceed was given in July 1976, it had already used its floating equipment on other jobs and had to rent substitute equipment in the market—allegedly at a cost higher than contemplated in its bid for the use of its own barges.

The contractor's legal argument proceeds as follows. First, conceding that the contract contained no "suspension

of work" clause, Massman, nevertheless, contends that the departure from a June 15, 1975, start time constituted a *change* cognizable under the "changes" article of the contract and that both *time* and *price* can be adjusted under that article. (Paragraph 18 of Special Conditions of the contract. Exh. 1.) Failure by TVA to issue such a change and make an equitable adjustment constituted, Massman contends, a breach of contract. In the alternative, it is argued that TVA violated an implied duty to cooperate with the contractor in making the work available and that this duty was clearly breached by delay of about fourteen months in granting the contractor permission to proceed. It is the contractor's position that under this theory of the case, it need not be shown that TVA was negligent or otherwise tortiously at fault in causing the delay.

The contractor reinforces its legal position by reliance on a communication from the Purchasing Agent (Mr. J.C. Thornton) during the period of delay to the contractor in which the delay was acknowledged, and an offer of an equitable adjustment made. (Thornton letter of October 28, 1975, Exh. 12.) It is not wholly clear from the briefs or the record of the hearing, but it appears that Massman seeks to treat this incident as providing the basis for equitable estoppel or the basis for its alleged reliance in going forward with the work at a time when it would not otherwise have done so. (Transcript at pages 9, 13, 48, 52, 92. Massman's first brief at p.26.)

TVA's view of the facts and law may be briefly recapitulated. First, TVA contends that the contract did not guarantee a starting date of June 15, 1975; that Massman as a bidder was advised to visit the site of the project (Paragraph 3 of Special Conditions of the contract and page 4 of Schedule of Prices, Exh. 1.); that Massman did

in fact so visit, and that it thereby learned of the starting date of at least October 1, 1975. TVA also takes the position that Massman could not legally rely on Mr. Thornton's letter of October 28, 1975, since there was no authority under this contract to allow an equitable adjustment for delays. And it is not permissible to apply the doctrine of equitable estoppel against a government agency, in TVA's view. Rather, TVA asserts, the contractor in any case must be sure of the agent's authority before acting on the appearance of authority. Finally, if there is any liability in TVA for the delays (presumably beyond October 15, 1975), it is required that the contractor prove fault or negligence on the part of TVA for the creation of these delays. TVA maintains that Massman has not sustained this burden by only showing the mere fact of the delays. TVA concedes there were delays in the start of the project.

Discussion

1. The distance between the parties in this appeal is measurable not so much by the differences in factual versions of the history of their relationship as by the competing characterizations made about the events and communications known to and acknowledged by both. The contractor claims a definite starting date close to the time the contract was awarded, in the spring of 1975. By the very term surrounding the date in the contract—June 15, 1975—it was "expected and not guaranteed." Moreover, Massman was not without further guidance. The very next paragraph (No.3 under Special Conditions) it is entitled "Visiting Site". That paragraph stated:

> "Bidders are advised to inspect and carefully examine the site and acquaint themselves with all existing conditions that may in any way affect carrying

out the work. Bidders should contact Walter Dahnke, Project Manager, or H.E. Smalling, Construction Engineer. . . . . "*

It is established that Massman's representative did indeed visit the site, talked with Mr. Smalling, and was informed that the work could not begin before October 1, 1975, (Transcript 70-71; and Exhs. 2 & 3). The contractor was thus in a position to know a major circumstance known to TVA—so far as the timing of the start of this project was concerned—and to know it when making its bid. And because the contractor knew or should have known these circumstances before submitting its bid on January 21, 1976, it is not now in a position to insist that it was following the "expected" date of June 15, 1975. If in fact Massman relied on the earlier but clearly "not guaranteed" date; it did so at its own risk and against the clear directive of TVA to visit the site and learn for itself what the up-to-date expectations were from TVA personnel on the job site.

2. Massman relies on three elements of the contract which, it is contended, support its view that June 15, 1975 was indeed a guaranteed start date—in spite of the fact discussed above that Section 1 of the contract disclaimed any such guarantee of that date. These are: (a) the fact that the length of time for the job was specified 215 days; (b) that a conclusion date of December 15, 1975,

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*A comparable provision appears on page 4 of The Contract's Schedule of prices in these terms:

"*Bidders to Visit Site of Work.* Prospective bidders are expected to visit the site of the work and to acquaint themselves with conditions . . . and to make their own estimate . . . and form their own conclusions as to hazards and possible contingencies . . . Before visiting the site, bidders should contact Walter Dahnke, Project Manager, in H.E. Smalling, Construction Engineer. . ." Page 4, Exh. 1.

was given; and (c) that the contract was declared "time to be of the essence" for this project.

These elements must of course be squared not only with each other but also reconciled with other features of the contract and the relations of the parties growing out of the contract between them. They are not isolated or independent terms. The length of the project was subject to be extended (Exh. 1) and two extensions of the time were in fact made. (Stipulations Nos. 15 & 16). Thus, the December 15, 1975, date was no more a guaranteed feature than a start date of June 15, 1975. If an expected start date of June 15, 1975, was not guaranteed, then it is reasonable—absent a gross *acceleration*—to infer that a completion date of December 15, 1975, would not be fixed or guaranteed either. Accordingly, the contractor was not entitled to rely on a rigid or wooden application of those features when the start date itself was not fixed at the time alleged. And while the expression "time is of the essence" has meaning, it is a meaning colored by the options open to the parties under other features of the contract. Thus, TVA contracted for a project of finite proportions so that its completion could be coordinated with other related projects of the overall Raccoon Mountain construction as a whole. It sought to adjust this interaction in several ways, including the granting of several extensions for completion, thus adhering as closely as other circumstances permitted to the contemplated 215 day operations period provided for in the contract.

3. *Delays beyond October 1, 1975.*

a. The Massman portion of the larger Raccoon Mountain project was not, on the other hand, subject to any and all rearrangement TVA might find expedient in light of complications, delays, or other vicissitudes to which

very large construction projects may be vulnerable. TVA's latitude while great, was not limitless. TVA's rights in this respect—as well as those of the contractor—are those undertakings, conditions and protections to be found expressed or implied within the contract.

b. An important condition, courts and contract boards have held, implied in every government contract is an obligation to cooperate with a contractor in making the work available, *i.e.*, to let the contractor do the work contemplated by the contract. *George A. Fuller v. United States*, 108 Ct. Cl. 70, 69 F. Supp. 409 (1947); *Ross Engineering v. United States*, 92 Ct. C. 253 (1940); *L.O. Brayton and Company*, 1 BCA No. 641-5-67, 70-2 BCA § 8510 (1970). See also *Peter Kiewit Sons Company, Inc. v. United States*, 138 Ct. Cl 668 (1957). And see *Commerce International Company v. United States*, 338 F.2d 81 (Ct. Cl. 1964): "The lapse of time must be tied to the defendant's breach of its obligation of reasonable cooperation. . . ." Id. at 85. And even where the contract contains no express provision as to the time within which the Government would give notice, the Court of Claims has held, "There was clearly an obligation . . . to give such notice within a reasonable time." *Ross Engineering v. United States*, 92 Ct. Cl. 253 at 258 (1940). The court found in Ross that a delay of 82 days in giving notice to start was unreasonable.

Were this not the law, every contractor would be at the mercy of the government agency in terms of whether the economic outcome would be a disaster or not to the contractor, especially in times of rapidly rising costs. Thus, a time frame within which to estimate performance costs is essential to an intelligent bid on government construction projects. There are apparently rare instances in

which the time for performance is so uncertain that a government agency may simply disclose that fact during the bid process and call for performance "at the convenience of the Government". In such a case, one court has held, the government is not to be held to this implied obligation to cooperate by giving *prompt* notice to proceed. See *Parrish v. United States*, 120 Ct. Cl. 100, 98 F. Supp. 347 (1951), cert. denied, 342 U.S. 953 (1952).

c. TVA stoutly insists that the law on this aspect of the case is controlled by the so-called *Rice* doctrine developed principally, in three Supreme Court decisions as follows: *United States v. Howard P. Foley Company*, 329 U.S. 64 (1946); *United States v. Rice*, 317 U.S. 61 (1942), and *H.E. Crook Company v. United States*, 270 U.S. 4 (1926). The common issue in those cases concerns the Government's liability for damages occurring through delay in starting the work. The Court found no such liability in the absence of a warranty for a certain start time. The doctrine has been taken to mean also that the changes clause then commonly in use—not substantially dissimilar to the one here—affords the contractor no protection for the ordinary delays of work; these are not *changes in the work* for which price adjustments are to be made.

What TVA neglects, however, in its treatment of these cases is a substantial case law after *Foley*, *Rice* and *Crook* which limits or distinguishes the holdings there in some circumstances. To be sure, *Foley*, *Rice*, and *Crook* have not been overturned by the Supreme Court, and are still often cited and followed in appropriate cases. *E.g.*, *Kent v. United States*, 343 F.2d 349 (2d Cir. 1965); *Commerce International Company v. United States*, 246 F. Supp. 81 (Ct. Cl. 1964); and *Broome Construction, Inc. v. United*

States, 492 F.2d 829 (Ct. Cl. 1974). What TVA's briefs do not adequately concede, however, is what the courts in other cases have said and done on more than one occasion since *Foley*.

"Where unreasonable delay is caused by the Government, the 'Rice Doctrine' does not preclude the recovery of damages flowing from that portion of the delay which is unreasonable." *Paul Hardeman, Inc. v. United States*, 406 F.2d 1357, 1361, n.7 (Ct. Cl. 1969). On another occasion the doctrine has been put in this broader context: "This general principle (of *Rice*, etc.) presupposes that the Government has met the ever-present obligation of any contracting party to carry out its bargain reasonably and in good faith." *Commerce International Company v. United States*, 338 F.2d 81, 85 (Ct. Cl. (1964). "(U)nless expressly negatived that duty is read into all bargains." Ibid. And from another of the cases cited by TVA a broader formulation of *Rice* was put this way: "Absent an unqualified warranty or expressed covenant, the government is not liable for delays in making a work site available where it seeks to do so in good faith *and the delay is not unnecessary, unreasonable, or is not defendant's fault.*" *Broom Construction, Inc. v. United States*, 492 F.2d 829 833 (Ct. Cl. 1974). (Emphasis added). For further discussion of the judicial development since *Foley* and *Rice* see Eldon H. Crowell, "Delays, Suspension, Acceleration", *Government Contracts Monograph*, No. 9, pages 1-23, George Washington University Government Contracts Program (1964); and see Melvin Rishe, "The Recognition of Delay, Disruption and Acceleration in Changed Work," (6) *Public Contract Law Journal*, 152 (1973).

The remaining questions under the heading of the post-October 1975 delay are whether a start time was

warranted by TVA and if not, whether TVA was otherwise responsible for these delays; namely, whether these delays were "unnecessary, unreasonable, or (the product of TVA's) fault."

d. This case is not like *Parrish v. United States*, cited above, where the Government warned the contractor that start time would be at the Government's convenience. While the start time for the Massman project was not precisely fixed initially in the invitation to bid, the agency had a year and a season in mind, namely, mid to late 1975. At first the date was "expected" to be June 15, 1975, but the bidders were advised to visit the site and determine more current facts. The contractor did so and learned from TVA personnel that a season later that same year was the likely start time, namely, October 1975. It was in this posture that the contractor here made its bid. While Massman had maintained that it actually used an earlier time frame, for reasons indicated above, (see "Discussion", paragraph 1.) such reliance was not justified. On the other hand, it *is* reasonable for the contractor to have based its estimates—submitted January 21, 1975—on a time frame commencing on or about October 1, 1975—since this was the last and most recent time given by TVA prior to the submission of the bid. As TVA says in its post hearing brief, dated September 29, 1980, at page 11: "Here the bid documents specifically instructed Massman to direct any inquiries to Mr. Smalling who has full authority in connection with the contract".

e. While it is recognized that October 1, 1975, was somewhat uncertain in the minds of the relevant TVA officials, it was nonetheless the last target date TVA gave for contractors to use in making their estimates of the work contemplated. And unlike the data provided

in the bid papers, this time reference did *not* contain the qualifying phrase used earlier, "expected but not guaranteed". There is in traditional legal concepts an adequate foundation for treating this period—commencing around October 15, 1975—as the "center of gravity" or common focus of the parties with reference to the bidding process. First, it is customary in the judicial construction of contracts and other instruments so to read their words and phrases that some meaning is preserved; in other words not to render the parties' expressions as nullities. See (4) Williston on Contracts § 620 (1961); and 1 *Restatement of Contracts* § 236 (a) (A.L.I. 1932): "An interpretation which gives a reasonable, lawful and effective meaning to all manifestations of intent is preferred to an interpretation which leaves a part of such manifestation unreasonable, unlawful or of no effect." Second, it is also ancient wisdom of American law that in areas of doubt it is permissable to construe words used by the *drafter* of an instrument—here TVA—strictly, giving them the most restricted or least expansive meaning. See (3) *Corbin on Contracts* § 559 (1960); and (1) *Restatement of Contracts* § 236 (d) (A.L.I. 1932): "Where words or other manifestations of intentions bear more than one reasonable meaning, an interpretation is preferred which operates more strongly against the party from whom they proceed. . . ."

f. In other words it is both plausible and fair to treat the reference by TVA at the critical time just before Massman submitted its bid as to October 1975, as having the meaning and significance a reasonable contractor would attach to this reference. (TVA has emphasized the importance of the on-site visit and presumptively condones what happened there. See, *e.g.*, transcript pages 100-101; also TVA's first brief, August 25, 1980, pp. 3-4;

TVA's second brief September 29, 1980, at pp. 10-11). Namely, the contractor was invited to consider how much it would do the job of otherwise finite dimensions for when it is estimated to begin in October 1975. If these words do not have this meaning, then all references to start time are illusory and Massman would be seen as being invited to bid for a contract to begin whenever the Government may say begin, *i.e.*, at the convenience of the Government.

This situation is comparable to that of *S. Patti Construction Company, etc., Joint Venturers* ASBCA, (1964) BCA § 4225, where prior to the bidding process the agency revised the specifications which had contained no delivery dates for certain steel sheet piles to be used on the job so as to indicate that the piles were scheduled for shipment partly in November and the remainder "*during* the latter part of *November or early December*". The Board there found the Government to have warranted the deliveries for these *periods* of time so that delivery in the last week of December constituted either a breach of contract or entitled the contractor to relief under the Suspension Clause of the contract there in question. (Of course the latter option is not relevant in the Massman case since the contract here in controversy contained no such clause). Thus, in the case at hand Massman was entitled to expect it would be allowed to proceed to work during October 1975, or reasonably soon thereafter, within that season and not nearly a year later. While TVA issued no formal addendum to its bid material, it created the functional equivalent by expressly incorporating in these materials a direction and advice to visit the work site. It must have expected that information obtained thereby would be relied upon and become as real a part of the contracting process as anything already in writing. And indeed TVA

has during this dispute attached special significance to this work site visit and to the October 1975, date stemming from it.

g. It is thus this hearing officer's conclusion that TVA did warrant a start-up time to the contractor, not a single specific date but a season, a three month period, one quarter of the year, following October 1, 1975. That this is a reasonable interpretation of all the relevant communication between the parties at appropriate times is borne out by the circumstances attending the design and execution of the project. Among the more contextual features is the fact that the initial postponement—from June 15, 1975 —to October 1, 1975—prior to the final formation of the contract but during its process was on this order of magnitude, namely, three and one-half months. Moreover, the very size of this construction project and its relationship to other construction projects on Raccoon Mountain and the fact that it had to be carried out in large part on the water with very heavy floating equipment meant that some flexibility had to be introduced into predictions of scheduling. But of course weighed against the latter considerations is the need for fairness to a contractor in the bidding enterprise needing appropriate perimeters of time to estimate its costs intelligently. This three month zone of time for start-up well serves the interests and needs of both parties to the contract. Both a relative degree of certainty and a relative degree of flexibility were provided by the project manager's communication to Massman during the site visit that "work would not start before October 1975".* (Exh.2).

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*Given the conclusion reached here, namely, that TVA did warrant a start-up season to the contractor, it is unnecessary to complete the alternative inquiry pressed on this appeal, namely, whether TVA was at fault in the post October delays or could be said to have acted unreasonably considering its implicit

(Continued on following page)

4. *The Thornton Letter.* Mr. J.C. Thornton, TVA purchasing officer for this contract, wrote to the Massman Company on October 28, 1975, and in that letter, first, recognized there was a delay in starting for which Massman was not responsible, and second, stated that TVA would make an equitable adjustment for Massman's increased costs attributable to the delay. Exh. 12. The competing contentions made by the parties with respect to this letter are set out above. See unnumbered fourth and fifth paragraphs under section entitled "Contentions". TVA is clearly correct its contention that Mr. Thornton did not have actual authority to promise what he appeared to promise to Massman in the letter of controversy. This is correct either under the explanation that the Changes Clause—as it is customarily construed—does not extend that far or under the explanation that this contract contained no Suspension Clause from which the officer could

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Footnote continued—

duty of reasonable cooperation. Without entering a formal finding or conclusion on the point, it does seem appropriate to note that there is evidence of record at least suggesting that a substantial part of the delay, approximately five months, might have been avoided or at least taken into account in bidding by an earlier appraisal by TVA of the yearly fish spawning season problem. Thus TVA personnel became visibly aware of this problem in September of 1975. See the handwritten note on copy of a letter of August 12, 1975, from Mr. Dahnke to Massman Construction Company, (Exh. 10). It is not clear how TVA first discovered it had a fish problem with its projected river dumping, but it is a natural presumption that if it was determined in September, 1975, without a formal application to the Corps of Engineers, it could also have been learned at much earlier times including a period more conveniently in advance of the contractor's bid. See also Exhs. 5, 11, 12, 14, 19. Considering the length of time contemplated for this project, 215 days or seven months, and given a fish spawning season of up to seven months, it seems certain that some part of the contractor's work would have to be performed at a time rather remote from the start of the work and after an interruption of that work, and yet this fact seemingly was not communicated to the contractor. Testimony of Mr. Langdon Hixon, Transcript pp. 81-83.

draw such authority. *Chaney and James Construction, Inc.* 1966-2 BCA (§ 6066). See also other relevant authorities on this point in "*Discussion*" paragraph "c", above.

On the other hand, TVA's position on equitable estoppel is overbroad. Thus, it is true in many cases the courts have refused to apply such a doctrine against the Government. See *e.g., Utah Power and Light v. United States*, 243 U.S. 389 (1970); *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947); *Automobile Club of Michigan v. Commissioner*, 353 U.S. 180 (1957). On the other hand, there is also persuasive authority to the effect that this earlier doctrinal rigidity is breaking down. In respect of commercial relations courts are willing to apply equitable estoppel against the Government when that doctrine's elements are otherwise present. See, e.g., *U.S. v. Georgia Pacific Co.*, 421 F.2d 92 (5th Cir. 1970); *Branch Banking and Trust Co. v. the U.S.* 98 F.Supp. 757 (Ct. Cl. 1951), *cert denied* 243 U.S. 893 (1951); and see *Investors Research Corp. v. SEC*, 628 F.2d 168 (D.C. Cir. 1980). See also *Moser v. U.S.*, 341 U.S. 41 (1951); K. Davis, *Administrative Law Treatise*, § 17.01-17.04 (1953 and 1980 Supp.); and Note, "Equitable Estoppel of the Government", 79 *Col. Law. Rev.* 551 (1979).

Thus, it could well be concluded that Thornton had apparent authority for what he did, particularly since had the contract been written so as to include a Suspension Clause or other similar authorization, it is undoubted that it would be the purchasing officer within whose scope of authority such adjustments as the one in question here would fall. See "General Conditions", No. 11, of the contract. Exh. 1.

There are nonetheless, two reasons why it is improper to apply estoppel in this case. One is the serious

doubt as to the viability of the distinction between sovereign versus proprietary functions in the case of the TVA. In other words while the tasks involved in *this* contract may be seen as proprietary or commercial when conducted by some other agency, these are of the essence of what this unique governmental agency was created to do.

The second reason why an estoppel should not apply here is that while Thornton's promise may be clear, the contractor's detrimental reliance is not. To be sure Massman has assserted a need for adjustment in contract price to cover the delays in start-up. There is testimony in the hearing of this appeal to the effect that Massman would not have gone forward without this assurance. (Transcript 49; 52). And in one letter to TVA Massman qualified its "concurrence" as to new dates "with the understanding that the contract will be equitably adjusted to reflect the increase in our cost". Letter of November 5, 1975; Exh. 13. This was after the Thornton letter of October 28, 1975. Yet from the whole record of this appeal it does not appear that Massman ever seriously contemplated not performing this contract. Thus at critical times the contractor acted or spoke as if it was or would be ready to perform, given the notice to proceed. In his letter to TVA of April 23, 1975, Mr. John Massman acknowledged the delays in start-up, noted increases in the costs of various materials, the need to "discuss with my suppliers the problem at hand", and declared the company was not looking for "unjustified modifications to our contract, but rather equitable adjustments due to causes beyond our control". Exh. 3. This was prior to Thornton's letter of October 28, 1975. Thus there is no clear, unequivocal indication that the contractor ever considered

the contract at an end. On the contrary there is an implicit desire to do the job—albeit *with* adjusted costs because of the delays of starting. And even in the testimony for the contractor during this hearing the evidence of attitude about the delays is equivocal. Thus Mr. John Massman revealed that on learning of the delays the company did not keep its barges on standby, but did keep its leadership personnel for this job employed awaiting the notice to proceed. Transcript at pp. 44-46. These acts are those of a contractor trying to save unnecessary costs growing out of delays in the 'go ahead' but nonetheless a contractor committed to doing the job when permitted to start it. Taken together the correspondence and the testimony do not provide a picture of a contractor which having abandoned the cause then is entreated back into performance based on a new and sufficient promise. The contractor may well have entertained at various times genuine expectations about an equitable adjustment to cover increased costs of the delay, but it seems clear on this record such expectations did not arise from nor were they created by the Thornton letter.

II

Three Month Interruption of the Work

The second part of this appeal concerns the interruption of dredging and spoiling operations during the spring and summer of 1977. In his decision of November 20, 1979, the Contracting Officer granted the contractor an equitable adjustment for additional costs incurred during this period, concluding that no provision of the Contract gave TVA the right to suspend the work and thus the interruption constituted breach of contract. Claim 4(b), Contracting Officer's decision, November 20, 1979. At that

time no breakdown of the costs so claimed had been presented to the Contracting Officer. In the meantime, since the original Contracting Officer's decision, Massman did submit figures, and the Contracting Officer's further decision awarding the contractor a total of $361,336 in additional costs is contained in a letter from Mr. James M. McCarter, for TVA, dated September 4, 1980.

Contentions. The contractor of course seeks to affirm the Contracting Officer's decision as to this part of its claim, except with regard to certain quantitative features of the award. These exceptions to the amount of the award are not now before the hearing officer and not ripe for decision. TVA, on the other hand, attacks the validity of its Contracting Officer's decision—so far as the claim relating to the interruption of work is concerned. More specifically, TVA contends that the stoppage was due to an "act of the soverign", thereby excusing TVA for ordering that stoppage, relying on the equivalent of a denial by the Corps of Engineers to extend the (404) permit to dump the dredged material in the river during the period of maximum fish spawning. Secondly, TVA contends that it did not bind itself to use an alternate method of disposal, and thus avoid the interruption of dredging and spoiling operation. In this respect, TVA presents a certain construction of the second sentence of the following provision, paragraph 1 (b) of the contract specifications:

> It is TVA's intention for the contractor to dispose of the remaining material . . . by hauling downstream in bottom dump scows and depositing in deep holes under water. . . . . *However, should this method be later prohibited, an alternate disposal site will be selected, and a contract change will be negotiated accordingly.* (Emphasis added.)

Finally, TVA contends that the work of dredging and spoiling would have been complete by the time the forced stoppage occurred if Massman had itself abided by the contract and finished its work within the contemplated 215 days.

Discussion. 1. Massman was informed by TVA on April 13, 1977, that all dredging and spoiling disposal operations must stop on April 30, 177. Stipulation No.17. Massman ceased all dredging and spoil disposal operations on April 30, 1977, and did not resume such work until August 1, 1977. Stipulations No.19, 20. During the period the dredging and spoil disposal operation was shut down, Massman performed other works out of sequence. Stip. No.21.

2. The procurement of a "404" permit from the Corps of Engineers proved indeed to be a formal condition for the water method of disposal related to the subject dredging operation. The underlying reason for the formality was both ecological and legal. Thus, the cyclical fish spawning season in the water affected and the various public laws protecting such natural phenomena were background or contextual features of the work contemplated for this TVA-initiated project. While no mention was apparently made in the contract itself of the requirement for a permit for water dumping, it is in its nature a kind of latent condition best discovered or knowable by the 'owner' of the project. That of course is TVA, and it was also the party which drafted the contract as well. It could have made the matter something to negotiate about, but it chose not to do so. Moreover, TVA acted at all times as if it had assumed the responsibility for procurement, extension, or renewal of the certificate. There is no dispute about that.

3. Given TVA's assumption of responsibility for the management of the certificate problem, and given the practical foreseeability of the underlying objection to spring-summer dumping (apparently by the State of Tennessee Wild Life Commission primarily) (Ex. 74, 76, 77), TVA's reliance on the act of sovereign doctrine here is misplaced. And the authorities cited by TVA in support of its related argument are simply not applicable to this case. The need to protect fish spawning in the Nickajack Lake (a part of the Tennessee River near Chatanooga) during a substantial period of time every year was an entirely predictable phenomenon, given both the requirements of nature and relevant public laws. If it was knowable when TVA formally applied for a 404 permit, it was knowable at much earlier times as well. Indeed, TVA personnel apparently did become aware of such a need some months before the time that the formal application was made. Thus, in a handwritten note dated September 26, 1975, on a copy of a TVA letter to the contractor (dated August 12, 1975) appears the message: "W.R. Dahnke attended a meeting in Knoxville on 9/25/75 in which it was determined (compromised) that no material would be dumped in Nickajack Reservoir prior to 8/15/76. . . ." Exh. 10. That the reference underlying this notation is to fish-spawning becomes clear in Mr. Dahnke's follow-up memorandum to Mr. J.C. Thornton, Purchasing Agent, on September 30, 1975, when he wrote: "Please advise the contractor that due to environmental considerations associated with the spoiling of dredged material in the river . . .. work cannot be started prior to August 15, 1976." Exh. 11. The actual application for the permit came six months later (April, 1976. TR. p.87.), but that is not material. What is important is that TVA knew or easily could have known of the underlying basis

for the restrictions likely to surround the permit or govern its time limits at times early enough to have avoided the need for interruption of the work, or at least to have permitted the contractor to plan to take such an interruption into account in estimating its costs. TVA did neither. See exhibits cited in footnote on pages A13-14, *supra*, and exhibits 74, 76; and TR. pp. 82-83. The contractor was apparently genuinely surprised by the interruption of work at the end of April, 1977; TVA should not have been.* Under the circumstances it is clearly not permissible to conclude that the interruption was an act "that a subsequent enactment forbids". *See* Restatement of Contracts, §458, Comment "a".

4. For reasons indicated above the defense of act of the sovereign is not available to TVA in this case. Were that all, it would be enough to conclude that the interruption of the work would be attributable to TVA and on its account and not the fault, caused by, or to be laid at the feet of the contractor. There is more, however, and it forms an independent and additional ground for assessing TVA with the increased costs, otherwise appropriate for this kind of contract, of the contractor growing out of the three month interruption. It is the provision in Article I (b) of the general provisions of the contract

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*Indeed, within TVA there appears to have been some controversy going back to the formation of the contract, if not before, as to a possible need for being able to schedule this work at any season. Thus, in a memorandum from Mr. W.R. Dahnke to Mr. Horace W. Mull, Director of Construction, dated January 17, 1977, referring to the Corps of Engineers preference for a conclusion to dumping by February 28, 1977, it is said:

> This is the last step in the relentless effort to narrow the available time to do this work. I have resisted every effort to restrict this operation to a particular time span but apparently to no avail. Please refer to memorandum from me to Robert N. Kennedy dated July 28, 1975, Final Environmental Impact Statement. (Exh. 31)

to the effect that "should (contemplated water disposal) method be later prohibited, an alternate site will be selected, and a contract change be negotiated accordingly". Exh. 1.

TVA attempts to meet the challenge of this contract term by an argument stressing a narrow meaning of the term "prohibit". It is true, of course, that the Corps of Engineers did not say *no* dredged material could ever be dumped; nor did it say TVA could not use the particular parts of the river contemplated by "the method". Rather the prohibition was one limited in time—no dumping during May, June, and July; but it was also a general prohibition as to the whole of the river (Nickajack Lake) so as to protect fisheries.

The word *prohibit*, defined conventionally as "refusing to permit; forbid by law or order" or "to prevent; hinder."* has no built-in references or restrictions as to time or scope of what is necessarily refused, forbidden, prevented, or hindered. Such qualifiers must come from other sources. Here it is clear that TVA preferred the water disposal method for the dredged material. Of course, it was also interested in this kind of operation only so far as it affected *this* project during the life of *this* contract. It was not concerned in Article I (b) with all manner of possible future prohibitions on water dumping of dredged material. Moreover, given the history of internal debate about this project, especially as relates to the 404 permit matter, its timing and the ecological dimension, the proviso in Article I (b) seemed peculiarly well-adapted to achieve an identifiable purpose. That purpose must have been to keep the overall project on schedule. Its in-

*Webster's New World Dictionary (2d. 1980) p. 1136.

clusion probably reflects the internal concern of TVA with the imponderables of seasonable water dumping. In any event, whether these probabilities are true and accurate in fact or not, the inclusion of the proviso certainly provided the contractor with a safeguard against just the kind of work stoppage that did in fact occur here. TVA believes it was bound to stop, required by the Corps of Engineers to cease the work for a substantial time. It acted as if it were so bound and prevented further work for a period, moving the contractor to other work out of sequence, thus bringing about substantial economic consequences for the contractor. In these circumstances one could hardly imagine a clearer case calling for the application of a change of method or site so as to continue the dredging and dumping on schedule. And failing to do so, TVA breached an important and valuable feature of the contract. The contractor is entitled to prove its damages flowing from this default.

5. Finally, TVA contends that Massman had time to complete dredging before the 404 permit expired. In view of TVA's decision twice to extend the time for completion, presumably for good cause or reasons shown, it is an argument not now open to TVA and, in light of the considerations discussed above, of no help to its position. Stips. 15, 16. (A "very severe winter" was given by one TVA official as the principal cause for at least part of the stretch out of the dredging and spoiling work during 1977 just prior to interruption. (Exh. 36). The second of these extended the completion date to September 30, 1977, some five months beyond the time when Massman was required to interrupt the dredging and spoiling operations.

CONCLUSION

1. On this view of the law and the facts it comports with elemental fairness to conclude that the contractor was not obligated to wait indefinitely to do the job and to do it in the amount estimated for the season following October, 1975. The three delays which ensued after the contract was awarded, namely, those of April, July, and October 1975, extending the start time progressively by two, then four, and then finally five additional months carried the period of performance well beyond that reasonably to have been contemplated by the prudent bidder relying on the relevant communications from TVA. Indeed, counsel for TVA while contending that 10-12 months delay in starting does not work a breach, did concede during the hearing that it might be unreasonable to hold a contractor in similar circumstances bound into the indefinite future. Transcript p.103. No case holding a contractor to be so bound has been cited or found—unless the Government has clearly instructed the contractor before bidding that his is an understanding of a completely indefinite commencement. C f *Parrish v. U.S., supra.* This TVA did not do. One noted writer has observed: "In the absence of any representation, the Government must give notice within a reasonable time". Eldon Crowell, "Delays, Suspension and Acceleration", George Washington University *Government Contracts Monograph* no. 9, p.18 (1964), citing *Ross Engineering v. U.S., supra.* It would be anomalous indeed to hold that the contractor is entitled to less favorable treatment when *some* dates are specified that when none are. Thus, TVA in choosing to approximate the start time within a season cannot fairly be understood as stipulating that which does not manifestly appear namely—'this contract is subject to an indefinite or unknown start date'.

2. The record of this appeal permits the conclusion that contractor was obligated and privileged to do the job basing the estimates of its costs on a period of 215 days commencing reasonably soon after October 1, 1975. Thus, if between that season and the time when the contractor was finally allowed to proceed some ten months later, the prices of materials, equipment or services went up, the contractor is entitled to prove these by way of damages. Increases in labor cost were dealt with under a specific clause of the contract.

3. The three month period of interruption of dredging and spoiling operation of May, June, and July 1977, was a stoppage detrimental to the contractor's expected costs under the contract since completion of this work was artificially later in time than had been contemplated at bidding and the formation of the contract. Moreover, the contractor had to perform work out of sequence, giving rise to possible increases and other costs. The work stoppage was not attributable to an independent and unforeseeable act of sovereign so as to relieve TVA from responsibility for otherwise adjusting the relations of the parties. And in any event, whether or not TVA was forced to stop the work and unable to make other plans beforehand, TVA had committed itself in the contract to select an alternate dumping site in just such an event as this, and to negotiate a contract change. Its failure so to do constitutes a breach of contract entitling the contractor to prove its relevant damages therefore. By agreement of the parties any assessment of damages will be postponed until a hearing on that very matter is held.

4. While it should have been contemplated by the contractor, given a start-up time in the last quarter of 1975, that one winter season would be experienced in its

215 day project, the contractor could not have contemplated that the three month interruption of work would necessitate working through most a second winter, that of 1977-78. Accordingly, to the extent probative evidence is available the contractor may take this factor into account in presenting its economic hardship stemming from delays attributable to TVA under this opinion.

/s/ K. L. Penegar
Kenneth L. Penegar
Hearing Officer

March 3, 1981

TENNESSEE VALLEY AUTHORITY
Chattanooga, Tennessee 37401
470B Commerce Union Bank Building

September 4, 1980

Certified Mail
Return Receipt Requested

Massman Construction Company
3917 Broadway
Kansas City, Missouri 64111

Attention: Mr. John T. Massman

Gentlemen:

Subject: CONTRACT 75K35-75800 - EXCAVATION OF DISCHARGE CHANNEL AND CONSTRUCTION OF SHEET PILE CELLS - RACCOON MOUNTAIN PUMPED-STORAGE PLANT

My final decision as contracting officer on Massman's claim for additional time and compensation under the subject contract was issued on November 20, 1979. This decision granted Massman an equitable adjustment for the extra costs incurred due to the suspension of work discussed under Claim 4B. The decision further invited Massman to break down the claim to the elements of costs directly associated with the suspension of work and resubmit it along with supporting evidence to the satisfaction of the contracting officer. Your letter dated June 23, 1980, to Mr. Edwin W. Small details the claim in the amount of $403,692. The claim and my decision will be set forth as broken down by your letter.

Claim A - Supervision, Field Labor and Miscellaneous Delay Costs.

Massman claims $77,818 for the 92-day suspension period.

Decision - Massman's Claim A is divided into three segments as follows:

1. *Supervision*

Massman claims $25,990 for supervisory payroll and $5,686 for associated taxes and insurance for a total claim of $31,676. This allegedly covers the cost of supervision over the 92-day suspension period. Although Massman argues that reimbursement should be allowed for the entire period because "commencing the work out of sequence did not shorten the job or the delay," I feel that adjustment should be made only for the period in which time extensions have been granted. Extensions for this period granted either by the purchasing agent or my contracting officer's decision of November 20, 1979, total 76½ days.

Accordingly, I find that only 83.15% (76.5 ÷ 92) of the $25,990 requested or $21,611 is allowed.

Massman's claim of $5,686 for associated taxes and insurance includes $969 for FICA taxes, $210 for FUTA taxes and $4,507 for Workman's Compensation and General Liability insurance. These amounts also should be reduced in the same manner as the salaries above for a total of $4,728 allowed.

2. *Field Labor Escalation*

Massman claims a total of $34,819 for field labor escalation due to the additional 30 days granted by my decision dated November 20, 1979. In a letter dated August 26, 1980, Massman certified that payrolls for the amounts claimed were in fact paid, that subject payrolls were correct and complete, and that payments of fringe benefits have been made to the appropriate

programs as required. Accordingly, I find that Massman's claim in the amount of $34,819 to be allowable.

3. *Miscellaneous Delay Costs*

Massman claims $245 for superintendent living expense, $4,004 for home office expense, and profit at $7,074.

The home office expense of $4,004 (6% of $66,740) should be adjusted to correspond with my findings under Claim A(1) above. The adjustment is computed as follows:

Claim		Amount Allowed
Supervision		$26,339
Field Labor Escalation		34,819
Superintendent Living expense		245
	Total	$61,403
$61,403 X 6%	=	$ 3,684

Again referring to my decision dated November 20, 1979, I granted Massman an "equitable adjustment for additional costs incurred" during the period of suspension. Had a *Suspension of Work* clause been included in the contract, profit would not have been allowable. Accordingly, Massman's claim for profit is denied.

In summary, I find that Massman should be granted an equitable adjustment in the amounts listed below under Claim A:

Supervision	–	$26,339
Field Labor Escalation	–	34,819
Miscellaneous Delay Costs	–	3,929
Total	–	$65,087

Claim B – Out of Sequence Cell Labor.

Massman claims $36,872 due to increased dig and load costs. Because of the suspension, it became necessary for Massman to use a clamshell in lieu of a dragline, which resulted in a slower and more expensive operation .

Decision – I find Massman's claim to be reasonable except that profit in the amount of $3,352 should be excluded. Accordingly, an adjustment in the amount of $33,520 is allowed.

Claim C – Outside Equipment Rental.

Massman claims $221,321 for rental of outside equipment that was to be used specifically for the suspended work.

Decision – I find these costs to be allowable, with the exception of profit in the amount of $20,120. Total allowed – $201,201.

Claim D – Owned Equipment Rental and Miscellaneous Fuel Costs.

Massman claims $67,681 for owned equipment placed on the job and inactive during the suspension period.

Decision – Profit in the amount of $6,153 is not allowed.

The remaining $61,528 appears reasonable and is allowed as an equitable adjustment.

Summary – Massman's claims A – D and the amounts granted as an equitable adjustment due to the suspension of work between May 1 and August 1, 1977, are recapped as follows:

Claim	Amount	Amount Granted
A	$ 77,818	$ 65,087
B	36,872	33,520
C	221,321	201,201
D	67,681	61,528
	Total	$361,336

TVA's Division of Finance is, by copy of this decision, directed to issue a check to Massman in the amount of $361,336.

The letter supplements my letter dated November 20, 1979, and constitutes my final decision as contracting officer pursuant to the *Disputes* clause of the contract. If you decide to appeal my decision to TVA's General Manager, you must do so within 30 days after receipt of this letter by mailing or otherwise furnishing to me a written appeal to the General Manager. It should be addressed as follows:

Mr. William F. Willis, General Manager
Care of James W. McCarter
Open Market Procurement Branch
Division of Purchasing
Tennessee Valley Authority
Chattanooga, TN 37401

Any appeal of this decision will be consolidated with the damages portion of this dispute now being heard before Dean Kenneth L. Penegar.

Very truly yours,

/s/ James W. McCarter
James W. McCarter, Chief
Open Market Procurement
Branch

November 20, 1979

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Massman Construction Company
3917 Broadway
Kansas City, Missouri 64111

Attention: Mr. John T. Massman

Gentlemen:

CONTRACT 75K35-75800 - EXCAVATION OF DISCHARGE CHANNEL AND CONSTRUCTION OF SHEET PILE CELLS - RACCOON MOUNTAIN PUMPED-STORAGE PLANT

This is in response to your letter dated June 20, 1979, to Mr. James L. Williams, Jr., concerning Massman Construction Company's (hereinafter called "Massman") claim for additional time and compensation under the subject contract. Pursuant to your request, I am hereby rendering my final decision as contracting officer in accordance with General Condition 16, *Disputes*, of the contract.

On November 4, 1974, TVA invited bids for excavation of the discharge channel and construction of sheet pile cells at the Raccoon Mountain Pumped-Storage Plant. Three bids were received and opened on January 21, 1975. Award was made to Massman March 13, 1975, on the basis of low total bid in the amount of $2,565,400.

The claims, or synopsis thereof, will be set forth followed by my decision.

Massman's Claim No. 1: Massman claims a 57½-day excusable delay due to a suspension of work. All excavation work was allegedly suspended for the period May 1 to

August 1, 1977. The purchasing agent granted a total of 23½ days, leaving 34 calendar days in dispute.

Findings of Fact

1. TVA submitted an application to the Department of the Army for a permit under the Federal Water Pollution Control Act in order to "spoil" dredged material in Nickajack Lake.

2. Permit was received from the Nashville District, Corps of Engineers, on July 28, 1976, with an ending date of December 31, 1976. This date was subsequently extended to February 28, 1977, and then to April 30, 1977.

3. Contractor was advised by the project manager on April 14, 1977, to stop dredging and spoil operation by midnight April 30, 1977, due to the fact that the permit would not be extended.

4. All work was not suspended on April 30, 1977. On May 3, 1977, the TVA project manager verbally told Massman to "proceed immediately with the installation of sheet pile cells and other related work."

5. Contractor did not start cell work until June 6, 1977.

6. The only mobilization time contained in the contract was for the initial commencement of work (30 days).

7. Purchasing agent granted a time extension of 23½ days for the period of June 6 to August 1, 1977, based upon the suspension of excavation and the rescheduling of work in a different sequence.

Decision

Due to the fact that only dredging and spoil operations were suspended, I find that a time extension should be granted for this work only. Massman was promptly noti-

fied to "proceed immediately" with the cell work and time was not permitted by the contract for mobilization. The purchasing agent granted an extension of time during the period June 6 to August 1, 1977, based on the excavation work accounting for 50 percent of the total time required. Using this same logic, which appears reasonable, I find that 50 percent of the time between May 1 and June 6, 1977, (18 days) should be granted as an excusable delay. The additional 16 days claimed by Massman is denied for the reasons stated above.

Massman's Claim No. 2: Contractor claims an additional 46 days for changes in the construction method and out-of-sequence work caused by the suspension of work discussed under Massman's Claim No. 1. The purchasing agent granted 23 of the 46 days requested, with the remaining 23 days in dispute.

Findings of Fact

1. Excavation work was determined by the TVA project manager to be 88 percent complete on April 30, 1977.
2. Suspension of dredging and spoil operation resulted in the contractor commencing work on the line of breaker cells before excavation was 100 percent complete.

Decision

Massman's claim is based on the fact that they were forced to begin the cell work out of sequence which resulted in a change in construction methods. It is logical to assume that the suspension order forced the contractor to commence with the cell work prior to being mobilized with the necessary equipment and personnel. The contract file indicates that Massman was told verbally to "proceed im-

mediately with the installation of sheet pile cells and other related work." However, the file also indicates that "after sounding the bottom of the river the week of May 2 and having a diver inspect the bottom on May 10," a letter was sent to Massman on May 11 advising that "we accepted the condition of the bottom for cells 8 through 14 and asked that he proceed with the installation of cells 9 through 13, followed by cells 8 and 14." (Copy of letter not in file.) Work did not begin on the cells until June 6, 1977. I cannot find a basis for the 46 days requested by Massman but do find that an extension should be granted for a total of 35 days to cover the period of May 1 through June 5, 1977. This results in a total of 12 additional days over the 23 days already granted by the purchasing agent. Massman's claim for the additional 11 days is denied.

Massman's Claim No. 3: Massman claims an additional 30 days due to a quantity overrun. The purchasing agent granted a total of 22 days leaving 8 days in dispute.

Findings of Fact

1. Specifications section 1.a. states in part:
   The overburden is estimated at 157,000 cubic yards. . . . An estimated 53,500 cubic yards of rock must be excavated. . . .
2. Final quantity of dredged material—232,378 cubic yards.

Decision

The final quantity of dredged material resulted in an overrun of 21,878 cubic yards (232,378—210,500). Massman claims that the average daily production should be 742 cubic yards based on the production during the 12-month period when the unclassified excavation was ac-

tually performed. The purchasing agent, on the other hand, calculates an average daily production of 980 cubic yards based upon the promised performance of 215 calendar days.

The contract file reveals a letter to Massman from Walter R. Dahnke, TVA project manager, which states in part:

> According to our records, your forces have been on the project for approximately 20 percent of the time allotted for the performance of this contract. We have observed your operation on a daily basis and have had several discussions with your project manager.
>
> The result of these observations is a real concern for the lack of progress being made in the excavation of both rock and overburden.

Accordingly, I find that a computation based on "promised" performance to be more equitable than one based on actual performance. Your claim for 8 additional days is denied.

Massman's Claim No. 4: Contractor claims equitable adjustment in the contract price based upon a delay in receipt of notice to proceed and suspension of work. For clarity, the elements of this claim will be discussed separately under the following headings: Claim 4A, Delay in Commencement of Work and Claim 4B, Suspension of Work.

Claim 4A, Delay in Commencement of Work: Massman claims that the delay in issuance of notice to proceed was unreasonable and constituted a breach of contract. The claim further states that Massman commenced work upon

receipt of the notice under full agreement with the purchasing agent that it would be compensated for excess costs.

Massman's claim consists of the following:

1. Increases in home office supervision charge. Massman has listed eleven men who were assigned to the project and paid on a salaried basis. *Claim—$13,865.00.*

2. Workmen's compensation and general liability insurance increase. *Claim—$11,761.00.*

3. Umbrella insurance escalation—1975 rate was $1.53 per thousand, 1976-1978 rate was $2.08 per thousand. *Claim—$1,338.88.*

4. Hauling subcontractor—Massman claims 1975 rate from hauling subcontractor was $20 per hour, but had increased to $23 per hour in 1976. Claim—1,769 total hours for *$5,307.00.*

5. Cell fill escalation—increase of $0.25 per ton claimed for a total of 30,311 tons. *Claim—$7,577.75.*

6. Other materials and services escalation—based on increases in Consumer Price Index and Wholesale Price Index. *Claim—$109,914.27.*

7. Equipment escalation—Massman claims that it had its own equipment available in 1975 "but did not feel obligated to stand by on an indefinite basis. As a result, when we were able to start, we were forced to rent certain items." *Claim—$768,547.63.*

8. Special Equipment insurance—special insurance was required by the lessor. *Claim—$37,805.43.*

Total claim—$956,116.96.

Findings of Fact

1. Invitation to Bid Number 35-75800 stated that:

> It is expected, but not guaranteed, that TVA's construction schedule will require that work be started June 15, 1975, and completed December 15, 1975.
>
> Drilling and/or excavation may begin as soon as TVA notifies the contractor that the sites are available to him and as soon as the contractor's plan has been approved. . . . If the bidder fails to give commencement and completion dates for the installation, the bid will be considered as having offered commencement and completion on the date(s) stated in this invitation to be that by which commencement and completion of work is required and bidder agrees to accept award of a contract on that basis. . . . The contractor shall begin the work of installation on the date established by the project manager and shall complete the work within the time stated in the bid.

2. Upon site inspection prior to bid opening, all bidders, including Massman, were informed by project personnel that commencement of construction would be delayed until at least October 1975. The purchasing agent was not informed of this delay and an addendum was not issued.

3. Actual commencement date was August 18, 1976.

4. Change of Contract No. 3 changed contract performance date to March 18, 1977, based on Massman's promise of performance in 215 days after starting date as established by TVA.

5. The only contract provision addressing possible recovery for delay in commencement is entitled *Field Labor Cost Adjustment For TVA Wage Classifications,* which states in relevant part:

> If any revisions are made by TVA which are applicable to the minimum wage schedule attached to this contract between the date of contractor's bid and the date stipulated for completion of the contract, or any extension thereof authorized by TVA in accordance with the "Delays and Remedies" provision, the contract price shall be increased or decreased to reflect such revisions as follows:
>
> (a) For each classification actually used in work on the contract and with respect to which a revision is made in the wage rate or related benefits listed in the minimum wage schedule, the number of man-hours worked during the peperiod in which such revision is effective shall be determined from the certified payrolls submitted by the contractor or its subcontractor; and the increase or decrease in the respective wage rate or benefit shall be applied to this number of man-hours. The contract price shall be increased or decreased by the total net amount resulting from all such changes under the various classifications in the schedule. This labor cost adjustment shall be made regardless of the level of wage rates and other benefits actually paid by the contractor or subcontractor,

either before or during the period of work under this contract.

* * *

(c) This provision is applicable only to work which is subject to the TVA minimum wage schedule (form TVA 1851A or B) and *this provision is in lieu of all other adjustments for changes in labor costs.*

(d) Adjustments in contract price under this provision shall be made in connection with the final payment under the contract (emphasis added).

6. TVA's invitation to bid included a data questionnaire requesting the following information:

> Equipment—List the equipment you have available to perform the proposed work.

Massman's bid responded as follows:

> Due to the uncertain nature of the time period in which the work will be performed, we are not able to list the equipment which will be available for this project. However, sufficient equipment will be available and description of same can be furnished when time period is established.

7. Mr. J. C. Thornton's (purchasing agent) letter dated October 28, 1975, reads in relevant part:

> The delay in the actual commencement in the work beyond the dates specified in the contract is excusable under the provisions of Article 15 of the General Conditions, and an equitable adjustment of the contract price shall be made to reflect any in-

crease or decrease in your cost attributable to such delay. Any claim for adjustment supported by reasonable evidence should be made as soon as practicable after actual work has commenced.

Decision

No provision was contained in the contract authorizing the contracting officer to provide an equitable adjustment in the contract price for any extension of time. The *Delays and Remedies* clause provides for a time extension only. The language of the contract and Massman's bid indicates that the parties contemplated the possibility of a delay in commencement. The bidders, including Massman, were told at the site inspection that commencement would be delayed "until at least October 1975."

The contract provided only limited relief for any such delay. This was a fixed price contract with escalation provisions only for field labor adjustment under the contract provision entitled *Field Labor Cost Adjustment for TVA Wage Classifications.* Moreover, the delay in commencement was, for the most part, caused by the delay in obtaining the permit to spoil the dredged material in Nickajack Lake. The prolonged commencement in this instance was not due to TVA's inaction or improper action and was not the fault of TVA.

Massman's rental of equipment in lieu of using its own is found to be not due to the fault of TVA. Massman stated in its bid that it could not list the equipment that would be assigned to this proect due to the uncertainty of commencement. It must be assumed therefore that Massman contemplated the possibility that the delay in commencement would affect equipment availability when it submitted its bid and that Massman calculated its bid accord-

ingly. Moreover, the contracting officer gave Massman ample notice of when the work would commence. In a letter dated October 28, 1975, the contracting officer, J. C. Thornton, stated that "we are proceeding on the assumption that the permit will be issued in time for excavation in the dry to start about July 15, 1976, and excavation associated with spoiling dredged material in Nickajack Lake to start about August 15, 1976." Massman should have arranged for its equipment accordingly.

Massman's reliance upon the purchasing agent's promise of an "equitable adjustment" is unfounded since the contract language was unambiguous and did not authorize such payments. If Massman contends that the purchasing agent's statement was a contract modification agreeing to pay Massman's other costs, then this, too, is unfounded due to the apparent lack of any consideration from Massman to TVA in support of such a modification. Massman's commencement of work was not additional consideration, but merely the performance of contractual obligations it was already obligated to perform. Accordingly, Massman's claim for an equitable adjustment due to a delay in commencement of work is denied.

Claim 4B, Suspension of Work: Massman claims an equitable adjustment for the period May 1, 1977, to August 1, 1977. The dollar amounts of the claim were not broken down and were included in the amounts requested under Claim 4A above.

Findings of Fact

1. All excavation work was suspended on April 30, 1977, to be resumed "after August 1, 1977," by verbal order of the TVA project manager and by copy of a letter (copy of letter sent to Massman by TVA project man-

ager) from M. I. Foster, Director, TVA Division of Navigation Development and Regional Studies, to Howard Boatman, U.S. Corps of Engineers.

2. Work stoppage was due to TVA's not obtaining a further extension of permit.

3. Contractor made several attempts (May 17, May 18, and July 18, 1977) to obtain a commitment from the purchasing agent as to what he should do with the rented equipment, i.e., should he keep the equipment on rental or let it go back to its owner. The purchasing agent did not respondent.

4. The contract did not contain a *Suspension of Work* clause.

Decision.

Although I feel that the suspension was not due to the fault of the contracting officer, it is my opinion that TVA was responsible for obtaining the permit extension and that, in the absence of a contract clause giving TVA the right to suspend the work, the suspension constitutes a breach of contract. For this reason, and the fact that the purchasing agent failed to respond to the contractor's pleas for disposition of rented equipment, I find that Massman should be granted an equitable adjustment for additional costs incurred during this period. Since you have not broken down your claim for the extra costs incurred due to the suspension, a claim should be resubmitted to the satisfaction of the contracting officer with all *supporting evidence.*

Massman's Claim No. 5: Massman claims increased costs for F.I.C.A. and F.U.T.A. taxes in the amounts of $5,564.40 and $498.61, respectively.

Findings of Fact

1. The contract provision entitled *Field Labor Cost Adjustment for TVA Wage Classifications* states in relevant part:

> For each classification actually used in work on the contract and with respect to which a revision is made in the wage rate or related benefits listed in the minimum wage schedule, the number of man-hours worked during the period in which such revision is effective shall be determined from the certified payrolls submitted by the contractor or its subcontractor; and the increase or decrease in the respective wage rate or benefit shall be applied to this number of man-hours. The contract price shall be increased or decreased by the total net amount resulting from all such changes under the various classifications in the schedule.

Decision

The contract does not provide for adjustment in F.I.C.A. or F.U.T.A. taxes. Although Massman contends that these taxes could not have been contemplated at the time of bidding, the risk of such cost increases were on Massman under the contract. Accordingly, your claim is denied.

Massman's Claim No. 6: Massman claims overtime payments in the total amount of $17,206.11. This claim is based on "The refusal to establish the proper completion date and to timely grant time extensions" which "amounted to an order to accelerate." Massman further claims that there were orders in the field to work overtime.

Findings of Fact

1. Special Condition 16 of the contract entitled *Compensation for Overtime Work* reads in part as follows:

> It is not anticipated that TVA will request overtime work under this contract. If the contractor works overtime for any reason other than at the request of TVA, any additional cost resulting from such overtime will be at the expense of the contractor, and no additional compensation for such costs will be made by TVA.

Decision

Without enumerating each instance, there were excusable delays during the performance of this contract for which the contracting officer initially refused to grant an extension. I find, however, no evidence that the contracting officer either expressly ordered the contractor to accelerate the work, i.e., to complete it within the original performance period, or acted in any way to require completion within the original performance period. The only documentation that is even related to acceleration is a letter from the TVA project manager (relevant part quoted under Claim No. 3 above) to Massman dated October 6, 1976, expressing concern about the apparent lack of progress. This correspondence took place prior to any excusable delay under the contract. Moreover, there is no evidence to support Massman's claim that the field directed overtime work. Finally, the work was not actually or constructively accelerated since it was not completed by the contract performance date as extended for excusable delays. Accordingly, your claim is denied.

This letter constitutes my final decision as contracting officer pursuant to the *Disputes* clause of the contract.

Within thirty (30) calendar days from your receipt of this decision, you may appeal to TVA's General Manager by mailing or otherwise furnishing to me a written notice of appeal. It should be addressed as follows:

Mr. W. F. Willis, General Manager
Care of James W. McCarter
Open Market Procurement Branch
Division of Purchasing
Tennessee Valley Authority
Chattanooga, Tennessee 37401

Very truly yours,

James W. McCarter, Chief
Open Market Procurement Branch

JWM:PMG

CC: APS, E9088 C-K
G. H. Baltz, 710 CUBB C
J. E. Kerley, E9A19 C-K
H. S. Sanger, Jr., E11B33 C-K
H. E. Smalling, Raccoon Mountain
Frank Van Meter, E6B50 C-K

(Filed August 13, 1985)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 84-5375

MASSMAN CONSTRUCTION COMPANY,
Plaintiff-Appellant,

v.

TENNESSEE VALLEY AUTHORITY,
Defendant-Appellee.

Before: MERRITT, CONTIE and WELLFORD, Circuit Judges.

JUDGMENT

ON APPEAL from the United States District Court for the Eastern District of Tennessee.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby affirmed in part, and the case is remanded in part consistent with this opinion.

Each party is to bear its own costs on appeal.

ENTERED BY ORDER OF
THE COURT

John P. Hehman, Clerk
/s/ John Hehman
Clerk

Issued as Mandate: November 4, 1985
COSTS: NONE

(Filed October 25, 1985)

NO. 84-5375

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MASSMAN CONSTRUCTION COMPANY,
Plaintiff-Appellant,

v.

TENNESSEE VALLEY AUTHORITY,
Defendant-Appellee.

ORDER

BEFORE: MERRITT, CONTIE and WELLFORD, Circuit Judges

Following the entry of this court's decision in this case, filed August 13, 1985, Massman Construction Company has filed a petition for rehearing and the Tennessee Valley Authority has filed a response. Having considered the petition for rehearing and the response, the court now denies this petition for rehearing and reiterates its prior decision.

ENTERED BY ORDER OF
THE COURT

/s/ John P. Hehman
CLERK

(Filed November 13, 1985)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 84-5375

MASSMAN CONSTRUCTION CO.,
Plaintiff-Appellant,

v.

TENNESSEE VALLEY AUTHORITY,
Defendant-Appellee.

MOTION TO RECALL THE MANDANTE AND FOR LEAVE TO FILE A REPLY BRIEF TO APPELLEE'S RESPONSE AND FOR THE COURT TO CONSIDER THAT REPLY BRIEF

Comes now Massman and requests that the Court recall the Mandate issued November 4, 1985 and grant permission to Massman to file a Reply Brief to the Response made by TVA to Massman's Petition for Rehearing and for the Court to consider that Reply Brief in its final determination. The Response by TVA totally misstates the record on the two critical issues presented by TVA, relies on documents not admitted into evidence, and lifts items so far out of context as to distort their actual meaning.

In the interest of justice, Massman respectfully requests that the Court recall the Mandate issued Novem-

ber 4, 1985 and grant permission to Massman to file its Reply Brief and that this Reply Brief be considered by this Court.

Respectfully submitted,

Miller and Bash, P.C.
By /s/ R. W. Miller
R. W. Miller
222 Plaza Center Building
800 West 47th Street
Kansas City, MO 64112
(816) 531-0755
Attorneys for Plaintiff-Appellant,
Massman Construction Co.

MOTION DENIED:

/s/ Harry Wellford
U.S. Circuit Judge

11/18

UNITED STATES COURT OF APPEALS
Sixth Circuit
U.S. Post Office & Courthouse Building
Cincinnati, Ohio 45202

John P. Hehman
Clerk

Telephone
(513) 684-2953
FTS 684-2953

November 4, 1985

Mr. Karl Saulpaw, Clerk
U.S. District Court
P.O. Box 591
Chattanooga, TN. 37401

Re: Case No. 84-5375, Massman Construction Co., vs. T.V.A.
District Ct. No. 83-0118

Dear Mr. Saulpaw:

Enclosed please find:

(xx) the mandate issued in the above-styled case;
( ) the Court's slip opinion;
( ) a certified copy of the Court's order;
(xx) the certified record
( ) the certiifed record was never sent to this Court on appeal

Please acknowledge receipt of the above on the enclosed copy of this letter and return it to this office.

Yours very truly,

John P. Hehman, Clerk
s/ Nancy Schulkens
Deputy Clerk

The enclosed record consists of 02 vols. pleadings, ... vols. transcript, 03 vols. depositions, 05 vols. exhibits

.....

Name and Title of Authorized Agent
for District Court or NLRB

cc: w/enclosure

Mr. R. W. Miller
Mr. Edwin Small

(Filed August 13, 1985)

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

No. 84-5375

MASSMAN CONSTRUCTION COMPANY,
Plaintiff-Appellant,

v.

TENNESSEE VALLEY AUTHORITY,
Defendant-Appellee.

Before: MERRITT, CONTIE and WELLFORD, Circuit Judges.

JUDGMENT

ON APPEAL from the United States District Court for the Eastern District of Tennessee.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby affirmed in part, and the case is remanded in part consistent with this opinion.

Each party is to bear its own costs on appeal.

ENTERED BY ORDER OF
THE COURT

John P. Hehman, Clerk

/s/ John Hehman
Clerk

Issued as Mandate: November 4, 1985
COSTS: NONE

CONTRACT DISPUTES ACT OF 1978

Act of November 1, 1978, P. L. 95-563, 92 Stat. 2383

(Codified at 41 U.S.C. 601-613.)

AN ACT to provide for the resolution of claims and disputes relating to Government contracts awarded by executive agencies.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Contract Disputes Act of 1978".

Definitions

Sec. 2. As used in this Act—

(1) the term "agency head" means the head and any assistant head of an executive agency, and may "upon the designation by" the head of an executive agency include the chief official of any principal division of the agency;

(2) the term "executive agency" means an executive department as defined in section 101 of title 5, United States Code, an independent establishment as defined by section 104 of title 5, United States Code (except that it shall not include the General Accounting Office); a military department as defined by section 102 of title 5, United States Code, and a wholly owned Government corporation as defined by section 846 of title 31, United States Code, the United States Postal Service, and the Postal Rate Commission;

(3) The term "contracting officer" means any person who, by appointment in accordance with applicable regulations, has the authority to enter into and ad-

minister contracts and make determinations and findings with respect thereto. The term also includes the authorized representative of the contracting officer, acting within the limits of his authority;

(4) the term "contractor" means a party to a Government contract other than the Government;

(5) The term "Administrator" means the Administrator for Federal Procurement Policy appointed pursuant to the Office of Federal Procurement Policy Act;

(6) The term "agency board" means an agency board of contract appeals established under section 8 of this Act; and

(7) The term "misrepresentation of fact" means a false statement of substantive fact, or any conduct which leads to a belief of a substantive fact material to proper understanding of the manner in hand, made with intent to deceive or mislead. [41 U. S. Code 601.]

Applicability of Law

Sec. 3. (a) Unless otherwise specifically provided herein, this Act applies to any express or implied contract (including those of the nonappropriated fund activities described in sections 1346 and 1491 of title 28, United States Code) entered into by an executive agency for—

(1) the procurement of property, other than real property in being;

(2) the procurement of services;

(3) the procurement of construction, alteration, repair or maintenance of real property; or,

(4) the disposal of personal property.

(b) With respect to contracts of the Tennessee Valley Authority, the provisions of this Act shall apply only to those contracts which contain a disputes clause requiring that a contract dispute be resolved through an agency administrative process. Notwithstanding any other provision of this Act, contracts of the Tennessee Valley Authority for the sale of fertilizer or electric power or related to the conduct or operation of the electric power system shall be excluded from the Act.

(c) This Act does not apply to a contract with a foreign government, or agency thereof, or international organization, or subsidiary body thereof, if the head of the agency determines that the application of the Act to the contract would not be in the public interests. [41 U. S. Code 602.]

Maritime Contracts

Sec. 4. Appeals under paragraph (g) of section 8 and suits under section 10, arising out of maritime contract, shall be governed by the Act of March 9, 1920, as amended (41 Stat. 525, as amended; 46 U. S. C. 741-752) or the Act of March 3, 1925, as amended (43 Stat. 1112, as amended; 46 U. S. C. 781-790) as applicable, to the extent that those Acts are not inconsistent with this Act. [41 U. S. Code 603.]

Fraudulent Claims

Sec. 5. If a contractor is unable to support any part of his claim and it is determined that such inability is attributable to misrepresentation of fact or fraud on the part of the contractor, he shall be liable to the Government for an amount equal to such unsupported part of the claim in addition to all costs to the Government attribut-

able to the cost of reviewing said part of his claim. Liability under this subsection shall be determined within six years of the commission of such misrepresentation of fact or fraud. [41 U. S. Code 604.]

Decision by the Contracting Officer

Sec. 6. (a) All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision. All claims by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer. The contracting officer shall issue his decisions in writing, and shall mail or otherwise furnish a copy of the decision to the contractor. The decision shall state the reasons for the decision reached, and shall inform the contractor of his rights as provided in this Act. Specific findings of fact are not required, but, if made, shall not be binding in any subsequent proceeding. The authority of this subsection shall not extend to a claim or dispute for penalties or forfeitures prescribed by statute or regulation which another Federal agency is specifically authorized to administer, settle, or determine. This section shall not authorize any agency head to settle, compromise, pay, or otherwise adjust any claim involving fraud.

(b) The contracting officer's decision on the claim shall be final and conclusive and not subject to review by any forum, tribunal, or Government agency, unless an appeal or suit is timely commenced as authorized by this Act. Nothing in this Act shall prohibit executive agencies from including a clause in government contracts requiring that pending final decision of an appeal, action, or final settlement, a contractor shall proceed diligently with performance of the contract in accordance with the contracting officer's decision.

(c)(1) A contracting officer shall issue a decision on any submitted claim of $50,000 or less within sixty days from his receipt of a written request from the contractor that a decision be rendered within that period. For claims of more than $50,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable.

(2) A contracting officer shall, within sixty days of receipt of a submitted certified claim over $50,000—

(A) issue a decision; or

(B) notify the contractor of the time within which a decision will be issued.

(3) The decision of a contracting officer on submitted claims shall be issued within a reasonable time, in accordance with regulations promulgated by the agency, taking into account such factors as the size and complexity of the claim and the adequacy of the information in support of the claim provided by the contractor.

(4) A contractor may request the agency board of contract appeals to direct a contracting officer to issue a decision in a specified period of time, as determined by the board, in the event of undue delay on the part of the contracting officer.

(5) Any failure by the contracting officer to issue a decision on a contract claim within the period required will be deemed to be a decision by the contracting officer denying the claim and will authorize the commencement of the appeal or suit on the claim as otherwise provided

in this Act. However, in the event an appeal or suit is so commenced in the absence of a prior decision by the contracting officer, the tribunal concerned may, at its option, stay the proceedings to obtain a decision on the claim by the contracting officer. [41 U. S. Code 605.]

Contractor's Right of Appeal to Board of Contract Appeals

Sec. 7. Within ninety days from the date of receipt of a contracting officer's decision under section 6, the contractor may appeal such decision to any agency board of contract appeals, as provided in section 8. [41 U. S. Code 606.]

Agency Boards of Contract Appeals

Sec. 8. (a)(1) Except as provided in paragraph (2) an agency board of contract appeals may be established within an executive agency when the agency head, after consultation with the Administrator, determines from a workload study that the volume of contract claims justifies the establishment of a full-time agency board of at least three members who shall have no other inconsistent duties. Workload studies will be updated at least once every three years and submitted to the Administrator.

(2) The Board of Directors of the Tennessee Valley Authority may establish a board of contract appeals for the Authority of an indeterminate number of members.

(b)(1) Except as provided in paragraph (2), the members of agency boards shall be selected and appointed to serve in the same manner as hearing examiners appointed pursuant to section 3105 of title 5 of the United States Code, with an additional requirement that such members shall have had not fewer than five years' ex-

perience in public contract law. Full-time members of agency boards serving as such on the effective date of this Act shall be considered qualified. The chairman and vice chairman of each board shall be designated by the agency head from members so appointed. The chairman of each agency board shall receive compensation at a rate equal to that paid a GS-18 under the General Schedule contained in section 5332, United States Code, the vice chairman shall receive compensation at a rate equal to that paid as GS-17 under such General Schedule, and all other members shall receive compensation at a rate equal to that paid a GS-16 under such General Schedule. Such positions shall be in addition to the number of positions which may be placed in GS-16, GS-17, and GS-18 of such General Schedule under existing law.

(2) The Board of Directors of the Tennessee Valley Authority shall establish criteria for the appointment of members to its agency board of contract appeals established in subsection (a)(2), and shall designate a chairman of such board. The chairman of such board shall receive compensation at a rate equal to the daily rate paid a GS-18 under the General Schedule contained in section 5332, United States Code for each day he is engaged in the actual performance of his duties as a member of such board. All other members of such board shall receive compensation at a rate equal to the daily rate paid a GS-16 under such General Schedule for each day they are engaged in the actual performance of their duties as members of such board.

(c) If the volume of contract claims is not sufficient to justify an agency board under subsection (a) or if he otherwise considers it appropriate, any agency head shall arrange for appeals from decisions by contracting officers

of his agency to be decided by a board of contract appeals of another executive agency. In the event an agency head is unable to make such an arrangement with another agency, he shall submit the case to the Administrator for placement with an agency board. The provisions of this subsection shall not apply to the Tennessee Valley Authority.

(d) Each agency board shall have jurisdiction to decide any appeal from a decision of a contracting officer (1) relative to a contract made by its agency, and (2) relative to a contract made by any other agency when such agency or the Administrator has designated the agency board to decide the appeal. In exercising this jurisdiction, the agency board is authorized to grant any relief that would be available to a litigant asserting a contract claim in the United States Claims Court.

(e) An agency board shall provide to the fullest extent practicable, informal, expeditious, and inexpensive resolution of disputes, and shall issue a decision in writing or take other appropriate action on each appeal submitted, and shall mail or otherwise furnish a copy of the decision to the contractor and the contracting officer.

(f) The rules of each agency board shall include a procedure for the accelerated disposition of any appeal from a decision of a contracting officer where the amount in dispute is $50,000 or less. The accelerated procedure shall be applicable at the sole election of only the contractor. Appeals under the accelerated procedure shall be resolved, whenever possible, within one hundred and eighty days from the date the contractor elects to utilize such procedure.

(g)(1) The decision of an agency board of contract appeals shall be final, except that—

(A) a contractor may appeal such a decision to the United States Court of Appeals for the Federal Circuit within one hundred twenty days after the date of receipt of a copy of such decision, or

(B) the agency head, if he determines that an appeal should be taken, and with the prior approval of the Attorney General, transmits the decision of the board of contract appeals to the Court of Appeals for the Federal Circuit for judicial review under Section 1295 of title 28, United States Code, within one hundred and twenty days from the date of the agency's receipt of a copy of the board's decision.

(2) Notwithstanding the provisions of paragraph (1), the decision of the board of contract appeals of the Tennessee Valley Authority shall be final, except that—

(A) a contractor may appeal such a decision to a United States district court pursuant to the provisions of section 1337 of title 28, United States Code within one hundred twenty days after the date of receipt of a copy of such decision, or

(B) The Tennessee Valley Authority may appeal the decision to a United States district court pursuant to the provisions of section 1337 of title 28, United States Code, within one hundred twenty days after the date of the decision in any case.

(h) Pursuant to the authority conferred under the Office of Federal Procurement Policy Act, the Administrator is authorized and directed, as may be necessary or desirable to carry out the provisions of this Act, to issue guidelines with respect to criteria for the establishment, functions, and procedures of the agency boards (except for a board established by the Tennessee Valley Authority).

(i) Within one hundred and twenty days from the date of enactment of this Act, all agency boards, except that of the Tennessee Valley Authority, of three or more full-time members shall develop workload studies for approval by the agency head as specified in section 8(a)(1). [P. L. 97-164, Apr. 2, 1982, 96 Stat. 47, 48; 41 U. S. Code 607.]

Small Claims

Sec. 9. (a) The rules of each agency board shall include a procedure for the expedited disposition of any appeal from a decision of a contracting officer where the amount in dispute is $10,000 or less. The small claims procedure shall be applicable at the sole election of the contractor.

(b) The small claims procedure shall provide for simplified rules of procedure to facilitate the decision of any appeal thereunder. Such appeals may be decided by a single member of the agency board with such concurrences as may be provided by rule or regulation.

(c) Appeals under the small claims procedure shall be resolved, whenever possible, within one hundred twenty days from the date on which the contractor elects to utilize such procedure.

(d) A decision against the Government or the contractor reached under the small claims procedure shall be final and conclusive and shall not be set aside except in cases of fraud.

(e) Administrative determinations and final decisions under this section shall have no value as precedent for future cases under this Act.

(f) The Administrator is authorized to review at least every three years, beginning with the third year

after the enactment of the Act, the dollar amount defined in section 9(a) as a small claim, and based upon economic indexes selected by the Administrator adjust that level accordingly. [41 U. S. Code 608.]

Actions in Court: Judicial Review of Board Decisions

Sec. 10. (a)(1) Except as provided in paragraph (2), and in lieu of appealing the decision of the contracting officer under section 6 to an agency board, a contractor may bring action directly on the claim in the United States Claims Court, notwithstanding any contract provision, regulation, or rule of law to the contrary.

(2) In the case of an action against the Tennessee Valley Authority, the contractor may only bring an action directly on the claim in a United States district court pursuant to section 1337 of title 28, United States Code, notwithstanding any contract provision, regulation, or rule of law to the contrary.

(3) Any action under paragraph (1) or (2) shall be filed within twelve months from the date of the receipt by the contractor of the decision of the contracting officer concerning the claim, and shall proceed de novo in accordance with the rules of the appropriate court.

(b) In the event of an appeal by a contractor or the Government from a decision of any agency board pursuant to section 8, notwithstanding any contract provision, regulation, or rules of law to the contrary, the decision of the agency board on any question of law shall not be final or conclusive, but the decision on any question of fact shall be final and conclusive and shall not be set aside unless the decision is fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence.

(c) In any appeal by a contractor or the Government from a decision of any agency board pursuant to section 8, the court may render an opinion and judgment and remand the case for further action by the agency board or by the executive agency as appropriate, with such direction as the court considers just and proper.

(d) If two or more suits arising from one contract are filed in the United States Claims Court and one or more agency boards, for the convenience of parties or witnesses or in the interest of justice, the United States Claims Court may order the consolidation of such suits in that court or transfer any suits to or among the agency boards involved.

(e) In any suit filed pursuant to this Act involving two or more claims, counterclaims, cross-claims, or third-party claims, and where a portion of one such claim can be divided for purposes of decision or judgment, and in any such suit where multiple parties are involved, the court, whenever such action is appropriate, may enter a judgment as to one or more but fewer than all of the claims, portions thereof, or parties. [P. L. 97-164, Apr. 2, 1982, 96 Stat. 47, 48, 49; 41 U. S. Code 609.]

Subpena, Discovery, and Deposition

Sec. 11. A member of an agency board of contract appeals may administer oaths to witnesses, authorize depositions and discovery proceedings, and require by subpena the attendance of witnesses, and production of books and papers, for the taking of testimony or evidence by deposition or in the hearing of an appeal by the agency board. In case of contumacy or refusal to obey a subpena by a person who resides, is found, or transacts business within the jurisdiction of a United States district court, the court, upon application of the agency board through the Attorney

General; or upon application by the board of contract appeals of the Tennessee Valley Authority, shall have jurisdiction to issue the person an order requiring him to appear before the agency board or a member thereof, to produce evidence or to give testimony, or both. Any failure of any such person to obey the order of the court may be punished by the court as a contempt thereof. [41 U.S. Code 610.]

Interest

Sec. 12. Interest on amounts found due contractors on claims shall be paid to the contractor from the date the contracting officer receives the claim pursuant to section 6(a) from the contractor until payment thereof. The interest provided for in this section shall be paid at the rate established by the Secretary of the Treasury pursuant to Public Law 92-41 (85 Stat. 97) for the Renegotiation Board. [41 U. S. Code 611.]

Appropriations

Sec. 13.(a) Any judgment against the United States on a claim under this Act shall be paid promptly in accordance with the procedures provided by section 1302 of the Act of July 27, 1956 (70 Stat. 694, as amended; 31 U. S. C. 724a).

(b) Any monetary award to a contractor by an agency board of contract appeals shall be paid promptly in accordance with the procedures contained in subsection (a) above.

(c) Payments made pursuant to subsections (a) and (b) shall be reimbursed to the fund provided by section 1302 of the Act of July 27, 1956, (70 Stat. 694, as amended; 31 U. S. C. 724a) by the agency whose appropriations were

used for the contract out of available funds or by obtaining additional appropriations for such purposes.

(d)(1) Notwithstanding the provisions of subsection (a) through (c), any judgment against the Tennessee Valley Authority on a claim under this Act shall be paid promptly in accordance with the provisions of section 9(b) of the Tennessee Valley Authority Act of 1933 (16 U. S. C. 831(h)).

(2) Notwithstanding the provisions of subsection (a) through (c), any monetary award to a contractor by the board of contract appeals for the Tennessee Valley Authority shall be paid in accordance with the provisions of section 9(b) of the Tennessee Valley Authority Act of 1933 (16 U. S. C. 831(h)). [41 U. S. Code 612.]

Severability Clause

Sec. 15. If any provision of this Act, or the application of such provision to any persons or circumstances, is held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those to which it is held invalid, shall not be affected thereby. [41 U. S. Code 613.]

Effective Date of Act

Sec. 16. This Act shall apply to contracts entered into one hundred twenty days after the date of enactment. Notwithstanding any provision in a contract made before the effective date of this Act, the contractor may elect to proceed under this Act with respect to any claim pending then before the contracting officer or initiated thereafter.

United States Code, Title 41:

§ 321. Limitation on pleading contract provisions relating to finality; standards of review

No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: Provided, however, That any such decision shall be final and conclusive unless the same is fradulent [fraudulent] or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

§ 322. Finality of decisions on question of law not to be made matter of contract

No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board.

Supreme Court, U.S.
FILED
APR 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1268

In the Supreme Court of the United States

OCTOBER TERM, 1985

MASSMAN CONSTRUCTION CO., PETITIONER

v.

TENNESSEE VALLEY AUTHORITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

HERBERT S. SANGER, JR.
General Counsel
Tennessee Valley Authority
Knoxville, Tennessee 37902

JAMES E. FOX
Associate General Counsel

EDWIN W. SMALL
Attorney
Tennessee Valley Authority
Knoxville, Tennessee 37902

QUESTIONS PRESENTED

1. Whether petitioner is entitled to de novo review of its contract claim under the Contract Disputes Act of 1978.

2. Whether the decision of the hearing officer was supported by substantial evidence.

3. Whether petitioner's due process rights were violated by respondent's hearing procedures.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1268

MASSMAN CONSTRUCTION CO., PETITIONER

v.

TENNESSEE VALLEY AUTHORITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A29) is reported at 769 F.2d 1114. The opinions of the district court (Pet. App. A30-A43) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A116) was filed on August 13, 1985, and a petition for rehearing was denied on October 25, 1985 (Pet. App. A117). The petition for a writ of certiorari was filed on January 23, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner challenges the partly unfavorable resolution by an administrative hearing officer of its claim against the Tennessee Valley Authority (TVA) arising from a construction contract dispute. The United States District Court for

the Eastern District of Tennessee upheld the hearing officer's decision (Pet. App. A30-A43), and the court of appeals affirmed the district court in all relevant respects (*id.* at A1-A29).

1. a. On March 13, 1975, following competitive bidding, TVA awarded petitioner a $2,565,400 contract for the excavation of a discharge channel in the Tennessee River and construction of sheet pile cells in the channel at TVA's Raccoon Mountain pumped-storage project near Chattanooga, Tennessee (Pet. App. A1-A2). The invitation to bid, which became a part of the contract, stated that "[i]t is expected, but not guaranteed, that TVA's construction schedule will require that work be started June 15, 1975, and completed December 15, 1975" (Pet. App. A73; Administrative Record (A.R.) 419). The invitation also advised bidders to visit the site and talk to one of two named individuals to acquaint themselves with conditions which might affect performance of the work (Pet. App. A73-A74; A.R. 419). Petitioner visited the site before submitting its bid and was informed by one of the named individuals that work would not commence before October 1, 1975 (Pet. App. A74). Petitioner's bid stated (A.R. 418):

> Due to the uncertain nature of the time period in which the work will be performed, we are not able to list the equipment which will be available for this project. However, sufficient equipment will be available [and] description of same can be furnished when time period is established.

Work did not in fact start until August 1976 (Pet. App. A2). In addition, TVA suspended underwater excavation work for environmental reasons between April 30, 1977, and August 1, 1977 (*ibid.*).

Petitioner claimed that these delays resulted in increased costs to it in completing the work (Pet. App. A2). Its claims were initially decided by a TVA contracting officer, but petitioner contended that the amount allowed was insufficient and appealed his decision pursuant to the contract's "disputes" clause (*id.* at A2-A3). The clause provided for such an appeal and a hearing before TVA's General Manager or his designated representative (*id.* at A3, A32-A33 n.1). On January 18, 1980, the General Manager designated as his hearing officer Kenneth L. Penegar, Dean of the University of Tennessee School of Law (*id.* at A3, A34).

b. The hearing officer, with the agreement of the parties, held separate hearings on liability and damages (Pet. App. A3). The hearing on liability opened on August 4, 1980; on March 3, 1981, the hearing officer issued his decision (*ibid.*; Pet. App. A70-A95). He ruled that TVA was liable for the delay of the starting date after October 1, 1975, and also for the suspension of underwater excavation work between April 30 and August 1, 1977 (see *id.* at A3, A93-A95).[1] He rejected petitioner's contention that TVA was liable for all delays after June 15, 1975. On August 12, 1982, following a separate hearing on damages, the hearing officer issued his damages decision (*id.* at A3, A55-A69). The officer rejected petitioner's contention that TVA was liable for the total increased cost, finding that there were significant causes of increased costs for which petitioner was itself responsible (*id.* at A56-A57). The hearing officer then examined each item of increased cost claimed by petitioner and made detailed findings and conclusions as to all of them (*id.* at A58-A69). Because of the total cost basis on which petitioner's evidence had been presented, additional computations

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[1]The hearing officer also found that, if working through an extra winter (with its attendant delays) caused petitioner costs in addition to those contemplated by its bid, they were chargeable to TVA as well (Pet. App. A55, A94-A95).

as to various damages items were required to produce final dollar figures for a final order. The damages decision directed that the parties make these computations and submit an agreed final order incorporating them (*id.* at A69).

The proposed order which TVA prepared provided for an award of $378,541 in damages (Pet. App. A3-A4). Petitioner rejected this proposed order and submitted its own, which called for an award of $1,230,139; unlike TVA, however, petitioner included little or no explanation of how its calculations were made or what their relation was to the hearing officer's findings and conclusions (*id.* at A3, A52-A54; May 20, 1983, Small Aff. Exh. D). When asked by the hearing officer for such an explanation, petitioner, in a letter dated October 29, 1982, identified no errors in TVA's calculations, but instead reargued its (already rejected) total cost theory (May 20, 1983, Small Aff. Exh. F; Pet. App. A52-A54). On May 27, 1983, the hearing officer issued a final order (*id.* at A44-A50) adopting the damages calculations in TVA's proposed order and awarding petitioner $378,742 (which was $41,925 less than had already been paid by TVA to petitioner pursuant to the contracting officer's award). See also *id.* at A42.

2. a. On March 17, 1983, prior to the hearing officer's final order, petitioner filed the present action, seeking a de novo court trial of its claims. On August 5, 1983, after the hearing officer issued his supplemental opinion and final order, petitioner filed an amended complaint in which it contended for the first time that it had been denied its rights under the Contract Disputes Act of 1978, 41 U.S.C. 601 *et seq.* It contended in the alternative that the hearing officer's damages decision, supplemental opinion, and final order were arbitrary, capricious, not supported by substantial evidence, and erroneous as a matter of law, and should therefore be set aside, and that petitioner's due process

rights had been violated in the disputes proceeding. See Pet. App. A35.

The district court (Pet. App. A30-A36) concluded first that petitioner had waived its right to proceed under the Contract Disputes Act since it had failed to meet the requirement set forth in 18 C.F.R. 1308.4 that it include a notice of such an election in its letter first submitting a claim to TVA (Pet. App. A34-A35). Finding that petitioner was thereby bound to the remedies provided it in the contract's disputes clause, the district court then "thoroughly reviewed" the voluminous evidentiary record compiled before the hearing officer and affirmed his findings and conclusions, concluding that "[petitioner's] allegations are totally without merit" (*id.* at A35). Petitioner filed a motion to reconsider, which the district court (*id.* at A37-A43) denied as well, stating: "This Court agrees with [the hearing officer's] decision and finds it supported by the only and therefore substantial evidence" (*id.* at A43).

b. The court of appeals (Pet. App. A1-A29) affirmed the decision of the district court in all relevant respects. It concluded first (*id.* at A5-A10) that the Contract Disputes Act did not apply because of petitioner's waiver, although on somewhat different grounds than the district court: "We rather state as grounds for our decision that [petitioner] has waited too long for institution of action *under the plain language of the Act itself*" (*id.* at A9 (emphasis in original)). It concluded as well that petitioner was afforded due process (*id.* at A25-A27) and that "[petitioner] generally failed to prove its major claims for damages" (*id.* at A28). Nonetheless, "in the interest of justice" and not because of any identified error, the court of appeals ordered a limited remand to allow petitioner to present additional evidence to the hearing officer as to three damages claims rejected by him because petitioner had failed to provide evidence to support them (see *id.* at A27-A28).

ARGUMENT

The decision of the court of appeals in this factbound dispute is correct and does not conflict with any decision of this Court or of any other court of appeals. Review by this Court—the fifth tribunal to which petitioner has gone—is unwarranted.

1. Petitioner's first contention (Pet. 8-16) is that he is now entitled to proceed under the Contract Disputes Act of 1978 (CDA or the Act), 41 U.S.C. 601 *et seq.*, which provides for de novo review of contract claims. This contention is without merit.

The court of appeals affirmed the district court's holding that petitioner had waived its right to proceed under the CDA since "[petitioner] knowingly chose to present its claims pursuant to the contract's Dispute[s] clause" (Pet. App. A10). It pointed out that the CDA by its terms requires claims against the TVA to be "filed within twelve months from the date of the receipt by the contractor of the decision of the contracting officer concerning the claim" (41 U.S.C. 609(a)(3)). Here, the date of receipt of decision was November 20, 1979, but petitioner did not file until March 17, 1983—40 months later (Pet. App. A9-A10). The court of appeals was clearly correct that petitioner's proceeding through two full evidentiary hearings before the hearing officer, together with its failure to file suit prior to November 20, 1980, constituted a knowing election to proceed under the disputes clause (see *ibid.*).[2] See also *H.R. Henderson & Co.* v. *United States*, 169 Ct. Cl. 228, 245 (1965) (invoking estoppel in a similar context).[3]

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[2]As discussed at page 5, *supra*, the district court found waiver based on TVA's regulations rather than on the CDA. Either rationale is correct.

[3]The cases cited by petitioner (Pet. 8-16) are inapposite. Because petitioner made no election in the letter submitting its claim, it had no right under TVA's regulations to proceed under the CDA, and there

Under these circumstances, the essentially factual determination that petitioner waived its right to proceed under the CDA does not merit further review.[4]

2. Petitioner also challenges the hearing officer's decision (Pet. 16-28). Both of the courts below thoroughly examined the detailed record and found that decision to be supported by substantial evidence, and not to be arbitrary, capricious, or "grossly erroneous." This is conclusive as to the essentially factual issues petitioner raises. See *Berenyi* v. *District Director, INS*, 385 U.S. 630, 635-636 (1967); *Comstock* v. *Group of Institutional Investors*, 335 U.S. 211, 213-214 (1948).

In any event, petitioner's assertions are without merit. Petitioner's contention (Pet. 16-20) that the court of appeals' decision erroneously allowed an individual TVA employee to change the contract starting date from June 15, 1975, to October 1, 1975, ignores the fact that the contract document expressly stated that the June 15, 1975, date was "not guaranteed" and advised prospective bidders to visit the site and meet with one of two designated individuals to discuss the work (see page 2, *supra*).

Petitioner's contention (Pet. 21-24) that it should have received a profit markup under the "changes" clause of the contract on its increased costs from delay and work suspension is answered by *United States* v. *Rice*, 317 U.S. 61

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was therefore no violation of the regulations in not informing petitioner of a right it did not have; moreover, the Court of Claims' willingness to afford plaintiffs relief hinged on the facts of the particular cases, and petitioner's delay here was inexcusable. See *National Elec. Coil* v. *United States*, 227 Ct. Cl. 595 (1981); *H.R. Henderson & Co.* v. *United States, supra*.

[4]Of course, the issue of what constitutes waiver in the time period between enactment of the CDA and the date on which it became automatically effective is of limited—and diminishing—importance.

(1942), involving a changes clause which the court of appeals found "strikingly similar" to that involved here; in *Rice*, this Court held that such a changes clause does not allow an award of consequential damages based on a delay which makes no change in the work to be done. The decisions of the Court of Claims referred to by petitioner could not, of course, affect the continuing authority of a decision of this Court (see *United States* v. *Mason*, 412 U.S. 391, 396 (1973)); in any event, those decisions allowed recovery of costs or damages, not a profit markup, and are therefore consistent with the award by the court of appeals here of damages only.[5]

Petitioner's claims (Pet. 25-28) regarding burden of proof and evidence of damages are equally meritless and undeserving of review. The rule applicable in an appeal by a

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[5]Other cases—as well as the changes clause's plain language—confirm that the hearing officer (Pet. App. A67-A68) was correct in finding the clause inapplicable altogether. In general, absent particular contract provisions calling for a contrary result, delays constitute contract breaches entitling the contractor only to damages, and not to an equitable adjustment under a changes clause. See *Cosmo Constr. Co.* v. *United States*, 439 F.2d 160, 167-168 (Ct. Cl. 1971); *L.L. Hall Constr. Co.* v. *United States*, 379 F.2d 559, 561-562 (Ct. Cl. 1966); 4 J. McBride, T. Touhey & B. McBride, *Government Contracts* § 28.70[1], at 28-216 (1985) ("Stated broadly, the changes clause is inapplicable to a claim of delay"). As the court of appeals noted (Pet. App. A20), a profit markup is not ordinarily allowed on claims for breaches of contract that do not change the scope of the work but only the cost of performing it. See, *e.g.*, *J.D. Hedin Constr. Co.* v. *United States*, 347 F.2d 235, 259-260 (Ct. Cl. 1965); *Oliver-Finnie Co.* v. *United States*, 279 F.2d 498, 508 (Ct. Cl. 1960). A contract can, of course, specifically provide for an equitable adjustment for delay. This is often done by including a "suspension of work" clause in the contract (see 32 Fed. Reg. 16268 (1967); *United States* v. *Utah Constr. & Mining Co.*, 384 U.S. 394, 415-416 (1966)), or a "modified changes" clause (see 41 C.F.R. 1-7.602-3 (1984)). Petitioner's contract did not contain such a clause and, even where such clauses are included, they typically do not permit a profit markup on the delay and "suspension impact" costs authorized by such provisions. See *Holloway Constr. Co.* v. *United States*, 4 Cl. Ct. 779, 789 (1984).

contractor from a contracting officer's decision is that the appeal opens up every part of the decision, including those parts that are favorable to the contractor, for de novo decision by the hearing officer based on the evidence presented at the hearing before him. See, *e.g., Southwest Welding & Mfg. Co.* v. *United States*, 413 F.2d 1167, 1184-1185 (Ct. Cl. 1969); 1A J. McBride, T. Touhey & B. McBride, *Government Contracts* § 6.70[5] (1985 & Supp. 1986). Moreover, as the court of appeals noted (Pet. App. A13), this rule was specifically incorporated in the disputes clause of the contract here (see *id.* at A32 n.1). At the hearing, the burden of demonstrating damage remains, therefore, on the party claiming the breach (see, *e.g., id.* at A17-A18).

Regarding allocation of damages, the hearing officer could have rejected petitioner's inadequate proof of damages entirely for failure to make any effort to show to what extent its damages were the responsibility of the government. See, *e.g., Commerce Int'l Co.* v. *United States*, 338 F.2d 81, 89-90 (Ct. Cl. 1964). Instead, he went through the evidence point by point to allocate damages whenever the evidence permitted his doing so. Moreover, "in the interest of justice," the court of appeals has directed the district court on remand to allow petitioner another chance at demonstrating certain alleged damages attributable to TVA's delays despite the absence of any clear error in the hearing officer's assessment of those damages (Pet. App. A19-A20, A28). Under these circumstances, review by this Court is clearly unwarranted.[6]

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[6]This approach is entirely consistent with the liberal approach used in *S.W. Electronics & Mfg. Corp.* v. *United States*, 655 F.2d 1078 (Ct. Cl. 1981), on which petitioner relies. The court in *S.W. Electronics* also held that the total cost theory has long been "disfavor[ed]" (*id.* at 1086) and recognized it was being "liberal" in its judgment because of the "unique situation on appeal" there (*id.* at 1089). Moreover, as the language from *S.W. Electronics* that petitioner quotes (Pet. 27) makes clear, in that case plaintiff had made "efforts to present all available

3. Petitioner's final contentions (Pet. 28-30) are that it was denied due process because TVA's Office of the General Counsel assisted TVA's General Manager in selecting and evaluating hearing officers and administering their personal services contracts with TVA, responded incorrectly to petitioner's inquiry about TVA's contract disputes regulations, and made three telephone calls to the hearing officer to inquire about the status of the proceeding. Both the district court and court of appeals correctly held that none of this resulted in any denial of due process.

The limited involvement of TVA's Office of the General Counsel in assisting TVA's General Manager in selecting and evaluating hearing officers and administering their personal services contracts with TVA is in no way improper.[7] See *Withrow* v. *Larkin*, 421 U.S. 35, 46-59 (1975); *Marcello* v. *Bonds*, 349 U.S. 302, 311 (1955); *Jonal Corp.* v. *District of Columbia*, 533 F.2d 1192, 1196-1197 (D.C. Cir.), cert. denied, 429 U.S. 825 (1976).[8]

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evidence on damages" and the damages in question were " 'definitely attributable to the wrong' "—neither of which is the case here (655 F.2d at 1088-1089 (citation omitted)).

[7]TVA's General Manager, in accordance with TVA's normal practice, makes the actual designation and appointment of the hearing officer in a specific case (Willis Dep. 8; Sanger Dep. 32-33; Fox Dep. 6). The role of TVA's attorneys is limited strictly to drafting a proposed appointment letter for the General Manager to review and sign (based on which hearing officers are busy and which are not), whereby the General Manager designates a hearing officer from among a group of three or four individuals, all of whom TVA has previously determined to be qualified (Willis Dep. 8; Sanger Dep. 32-33; Fox Dep. 4-5, 6-7). This was the procedure followed in this case.

[8]*Baltimore Contractors, Inc.* v. *United States*, 643 F.2d 729 (Ct. Cl. 1981), cited by petitioner (Pet. 28-30), is not to the contrary. While the court pointed out that the same entity whose decisions were being appealed also had a significant role in selecting those who would decide these appeals, the circumstances which led the court there to invalidate a contract appeals board decision also included the following facts:

The January 18, 1980, response of TVA's General Counsel to petitioner's inquiry about TVA's contract dispute regulations was correct. In any event, petitioner had ample opportunity to challenge TVA's regulations and the agency's interpretation of them; moreover, petitioner's suit was untimely under the CDA itself.

The court of appeals and the district court both noted that "uncontroverted testimony" showed that the three telephone conversations between counsel for TVA and the hearing officer involved solely procedural matters (Pet. App. A25-A27, A35-A36, A43),[9] and petitioner apparently concedes (Pet. 29-30) that "the merits of [its] claim was not

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(1) General Accounting Office (GAO) attorneys served part-time as members of the contract appeals board even though their full-time GAO supervisors were involved in advising the government with respect to various claims under the contract at issue, (2) office space and secretarial personnel were shared between government trial counsel and members of the contract appeals board, and (3) ex parte communications in the form of memoranda concerning the contractor's claims were furnished to the chairman of the contract appeals board by the government's trial counsel. None of these three circumstances is present here.

[9]TVA counsel swore in filed affidavits that the calls were to inquire when a final decision in the proceeding might be issued (Aug. 23, 1983, Small Aff.; Fox Aff.). The calls were made during the pendency of petitioner's original complaint claiming that delay in rendering the decision entitled petitioner to renounce the proceeding before the hearing officer, so the information as to when the decision could be expected was of obvious relevance to TVA's preparation for defense in the action. The merits of the case were not discussed, nor was a decision pressed for. The substance of the conversations was promptly communicated to the district court and to petitioner in TVA's brief, filed on May 23, 1983, a few days after the last phone call (Fox Aff.). During the first call, the hearing officer, being unable then to give an expected date, suggested that a further inquiry or inquiries be made later (Aug. 23, 1983, Small Aff.). While in most formal civil litigation, requests about procedural matters may be made through a clerk without direct communication with the judge, in more informal proceedings such as this, no clerk is employed and such requests, if they are to be made at all, must be made to the hearing officer.

discussed." There is nothing improper about such communications and, even if there were, they certainly were not prejudicial in this case and provide no basis for overturning an otherwise valid decision; the cases cited by petitioner (Pet. 28-30) are not to the contrary (see, *e.g.*, *PATCO* v. *Federal Labor Relations Auth.*, 685 F.2d 547, 563, 568-569 (D.C. Cir. 1982)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

HERBERT S. SANGER, JR.
General Counsel
Tennessee Valley Authority

JAMES E. FOX
Associate General Counsel

EDWIN W. SMALL
Attorney
Tennessee Valley Authority

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